90-992

No. .....

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF NEVADA, et al.,

Petitioners,

v.

JAMES D. WATKINS, Secretary of the United States Department of Energy, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether the Property Clause, Art. IV, § 3, cl. 2 of the United States Constitution, may serve as a textual basis for Congress' power to enact the Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425, 96 Stat. 2211, (NWPA) 42 U.S.C. §§ 10101 et seq. and the Nuclear Waste Policy Amendments Act of 1987 (Amendments Act) Pub. L. 100-203, Title V, 101 Stat. 1330.

II.

Whether the Property Clause may preempt, without reference to the preemptive effect of another enumerated power, the State of Nevada's legislative enactments that either veto or otherwise conflict with the federal high-level radioactive waste repository program.

III.

Whether positive limitations in the

Constitution restrict Congress' power to impose a locally opposed federal facility for privately produced high-level radioactive waste disposal on an unconsenting state such as Nevada.

IV.

Whether the enactment by Congress of a statute that identifies and singles out the State of Nevada to shoulder the entire economic, environmental, health and safety consequences of hosting a federal repository for the Nation's privately produced high-level radioactive waste through provisions included in a Title of an Omnibus Budget Reconciliation Act, which provisions were drafted by a conference committee, is a violation of Nevada's Tenth Amendment rights.

V.

Whether Nevada has effectively exercised a constitutional right and/or a right emanating from Sections 115 and 116

of the Nuclear Waste Policy Act to veto the development of a high-level radioactive waste repository at Yucca Mountain Nevada.

VI.

Whether the Secretary of Energy abused his discretion by failing to establish procedures for addressing disqualification criteria set forth in 10 C.F.R. Part 960 on a continuing basis and by failing to determine that the Yucca Mountain site is unsuitable for development as a repository.

PARTIES

A list of all parties who initiated the two proceedings in the Ninth Circuit Court of Appeals whose judgment is sought to be reviewed, as well as respondents and intervenors, appear in the caption of the cases reproduced at pp. 1 to 2 of the Appendix.

The Petitioners before this Court

are the State of Nevada; Bob Miller, Governor of Nevada; Harry Reid, United States Senator; Richard H. Bryan, United States Senator; Barbara Vucanovich, United States Representative in Congress and James Bilbray, United States Representative in Congress.[1]

The Respondents are the United States Department of Energy, James D. Watkins, Secretary of Energy and the following Utilities:

Arizona Public Service Company; Baltimore Gas & Electric Company; Carolina Power & Light Company; Consolidated Edison Company of New York, Inc.; Detroit Edison Company; Duke Power Company; Duquesne Light Company; Florida

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[1]Pursuant to Fed R. App. P. 43(c)(1) and Rule 35.3 of this Court the following substitutions are noted: Bob Miller, Governor of Nevada, is substituted for Richard H. Bryan, as former Governor of Nevada, Harry Reid, United States Senator, is substituted for Paul Laxalt, former United States Senator, James Bilbray, United States Representative in Congress, is substituted for Harry Reid, former United States Representative in Congress.

Power & Light Company; Gulf States Utilities Company; Iowa Electric Light & Power Company; Madison Gas and Electric Company; New York Power Authority; Northeast Utilities; Northern States Power Company; Pennsylvania Power & Light Company; Public Service Electric & Gas Company; Union Electric Company; Virginia Power; Wisconsin Electric Power Company; Wisconsin Power and Light Company; and Wisconsin Public Service Corporation.

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STATE OF NEVADA, et al.,

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JAMES D. WATKINS, Secretary of the United States Department of Energy, et al.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, the State of Nevada et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this action on September 19, 1990.

OPINIONS BELOW

OPINIONS OF COURT BELOW

The Opinion of the Ninth Circuit Court of Appeals whose judgment is sought

to be reviewed is reproduced at pp. 1 to 37 of the Appendix. It is officially reported at 914 F.2d 1545 (9th Cir. 1990).

The Ninth Circuit Court of Appeals had original jurisdiction of the matters in controversy pursuant to Section 119 of the NWPA, 42 U.S.C. § 10139. There are no other reports or opinions delivered in the case by other courts or administrative agencies.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on September 19, 1990. There was no petition for rehearing.

This Court's jurisdiction to review the Ninth Circuit Court of Appeals judgment and opinion is conferred by Article III of the Constitution, 28 U.S.C. § 2106 and Section 119 of the NWPA, 42 U.S.C. § 10139.

CONSTITUTIONAL PROVISIONS, APPLICABLE STATUTES AND REGULATIONS

The clauses and provisions of the Constitution are cited below and set forth verbatim at pp. 38 to 42 of the Appendix.

Property Clause, Art. IV, § 3, cl. 2; Federal Enclave Clause, Art. I, § 8, cl. 17; Bicameralism and Presentment Clause, Art. I, § 7, cl. 2, cl. 3; General Welfare Clause, Art. I, § 8, cl. 1; Guarantee Clause, Art. IV, § 4; Supremacy Clause, Art. VI, cl. 2 and Tenth Amendment.

The provisions of the Nuclear Waste Policy Act, as Amended, 42 U.S.C. § 10101 et seq. involved in this case are as follows:

Section 111, 42 U.S.C. § 10131

Section 112, 42 U.S.C. § 10132

Section 113, 42 U.S.C. § 10133

Section 114, 42 U.S.C. § 10134

Section 115, 42 U.S.C. § 10135

Section 116, 42 U.S.C. § 10136

Section 119, 42 U.S.C. § 10139

Section 160, 42 U.S.C. § 10172

Section 302(a)(5), 42 U.S.C. § 10222(a)(5)

Section 407, 42 U.S.C. § 10247

They are reproduced in the Appendix, pp. 43 to 138.

The following federal regulations are involved in this case:

10 C.F.R. § 60.2

10 C.F.R. § 60.121

10 C.F.R. Part 960

Except for 10 C.F.R. Part 960, they are reproduced in the Appendix, pp. 139 to 141. 10 C.F.R. Part 960 is voluminous. As no individual sections of 10 C.F.R. Part 960 are cited in this Petition they are unnecessary for an understanding of the Petition and, therefore, are not reproduced in the Appendix.

The following Nevada Statutes and Legislative resolutions are involved in this case:

NRS 459.910

Assembly Joint Resolution 4 (1989)

Assembly Joint Resolution 6 (1989)

They are reproduced in the Appendix, pp. 146 to 147.

STATEMENT OF THE CASE

In 1982, the Congress enacted the Nuclear Waste Policy Act (NWPA), Pub. L. No. 97-425, 96 Stat. 2211 (1983) (now codified, as amended, at 42 U.S.C. §§ 10101-10270) (1982 and Supp. V 1987)[2]. The NWPA, as originally enacted, provided a comprehensive legislative scheme for a national search for potentially acceptable repository sites (42 U.S.C. § 10136(a) (1982)) from which five would be nominated as suitable by the Secretary of Energy for site characterization. 42 U.S.C. § 10132(b)(1)(A) (1982). From these five sites, the Secretary of Energy was to recommend three to the President for the

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[2]Unless otherwise indicated, citation will be to Supp. V 1987.

actual process of characterization as candidate sites. 42 U.S.C. § 10132(b)(1)(B) (1982). After three sites had been found preliminarily suitable for a repository based upon site characterization results (42 U.S.C. § 10134(f)(1982), the Secretary was required to recommend one of them to the President for development as a national high-level radioactive waste repository. 42 U.S.C. § 10134(a)(1) (1982). The President was then authorized to transmit a recommendation of the site to Congress if he considered the site qualified for an application for a construction authorization for a repository. 42 U.S.C. § 10134(a)(2)(A).

On May 27, 1986, the Secretary nominated five sites for characterization as candidate sites (51 Fed. Reg. 19783-84, June 2, 1986) and recommended three sites, one each in Texas (Deaf Smith County),

Washington (Hanford Reservation) and Nevada (Yucca Mountain). The President approved the Secretary's recommendation.

On May 28, 1986, Nevada filed Case No. 86-7308, in which it sought review by the Ninth Circuit Court of Appeals of the Secretary of Energy's decision to proceed with the characterization of Yucca Mountain without having first acquired the jurisdiction and control over the site as required by the Nuclear Regulatory Commission's regulation, 10 C.F.R. § 60.121. Nevada contended that in the absence of the NRC's determination that a jurisdiction and control other than exclusive legislative authority was permissible, the Nevada Legislature's consent or cession of jurisdiction pursuant to Art. I, § 8, cl. 17 was required.

On December 22, 1987, the Congress amended the NWPA by bundling certain provisions entitled "Title V - Energy and

Environment Programs, Subtitle A - Nuclear Waste Amendments" Pub. L. No. 100-203, 101 Stat. 1330-227 (1987) (the 1987 NWPA amendments) with the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-202, 101 Stat. 1329 (1987) and Pub. L. No. 100-203, 101 Stat. 1330 (1987). The 1987 NWPA amendments designated Yucca Mountain as the sole site to be characterized for development as a repository site. 42 U.S.C. § 10172. Nevada's selection was made in the Conference Committee which considered the Senate version of the budget bill. The House version had no provisions amending the NWPA. No Nevada representatives were included in the Conference Committee.

Nevada was also selected by the 1987 amendments as an alternate to a site which may be selected through a process of voluntary negotiation with a willing state or Indian tribe. 42 U.S.C. § 10247(c)(2)(B).

On April 6, 1989, the Nevada Legislature enacted two resolutions, AJR 4 and AJR 6, which were approved by the Governor on April 17, 1989. App. 142 to 146. Assembly Joint Resolution 4, expressed the Nevada Legislature's "adamant opposition to the placement of a high-level radioactive waste repository in the State of Nevada." Assembly Joint Resolution 6 prohibited the Federal Government from establishing a repository at Yucca Mountain, Nevada, without the prior consent of the Nevada Legislature or a cession of jurisdiction pursuant to Chapter 328 of the Nevada Revised Statutes, which consent and cession were refused. On April 19, 1989, both AJR 4 and AJR 6 were transmitted to the President, the United States Senate and the House of Representatives. Congress took no action in response to the transmittal.

On June 28, 1989, the Nevada Legislature enacted Assembly Bill 222 which was signed into law by the Governor of the State of Nevada on July 6, 1989. Nevada Revised Statutes (NRS) 459.910 states:

> 1. It is unlawful for any person or governmental entity to store high-level radioactive waste in Nevada.
> 2. As used in this section, unless the context otherwise requires, "high-level radioactive waste" has the meaning ascribed to that term in 10 C.F.R. § 60.2.

App. pp. 146-147.

On September 18, 1989, the Nevada Governor, Bob Miller, requested an opinion from the Nevada Attorney General concerning the status of the repository program and the implications for various environmental permit applications filed by the DOE based upon his belief and his intention that AJR 4 and AJR 6 constituted a valid and effective notice of disapproval pursuant to Section 116(b), 42 U.S.C. § 10136(b) of the NWPA. The Attorney

General, in a letter opinion dated November 1, 1989, agreed that the Governor correctly characterized AJR 4 and AJR 6 as a notice of disapproval authorized by Section 116(b) of the NWPA, 42 U.S.C. § 10136(b). He further stated his opinion that the Yucca Mountain site had been disapproved by inaction from Congress.

On November 14, 1989, Nevada's Governor transmitted to Secretary of Energy, James D. Watkins, a letter notifying him that the Yucca Mountain site should be disqualified from further consideration based upon the State's notice of disapproval and the inability of the site to meet certain technical conditions referenced to criteria established by the Department of Energy in site suitability guidelines promulgated in 10 C.F.R. Part 960.

On November 29, 1989, Secretary of Energy, James D. Watkins, transmitted a

"Report to Congress on Reassessment of the Civilian Radioactive Waste Management Program," in which he made it clear that he would not recognize the State's notice of disapproval or disqualify the site. By letter dated February 28, 1990, addressed to the Governor of Nevada, the Secretary rejected the State's contention that Yucca Mountain should be disqualified because the presence of technical conditions rendered the site unsuitable for development as a repository.

On January 5, 1990, Nevada filed Case No. 90-70004, a petition for review of the Secretary of Energy's refusal to recognize Nevada's notice of disapproval as a veto of the site or a disqualifying condition and his failure to terminate site characterization activities because available evidence demonstrated that the site was not suitable under the Department of Energy's Guidelines.

On February 2, 1990, a motion's panel of the Ninth Circuit Court of Appeals ordered Case No. 90-70004 consolidated with Case No. 86-7308. The jurisdiction of the Court of Appeals is provided for in 42 U.S.C. § 10139(a)(1).

REASONS FOR GRANTING THE WRIT

I.

THIS CASE RAISES IMPORTANT CONSTITUTIONAL ISSUES CONCERNING THE ESTABLISHMENT OF FEDERAL FACILITIES IN UNCONSENTING STATES FOR THE STORAGE OF PRIVATELY PRODUCED, DANGEROUS SUBSTANCES

A. Federal Property Power

There are special and important reasons why this Court should review on writ of certiorari the Ninth Circuit Court of Appeals judgment and opinion in Case No. 86-7308 and Case No. 90-70004.

This is believed to be the first time in the history of the United States that the Congress of the United States has victimized a single state by forcing that State to accept a federal facility for the

emplacement forever of a privately produced hazardous and highly radioactive waste by-product which no other state will voluntarily accept. Yucca Mountain in southern Nevada has been tentatively selected, if found suitable, for the geologic storage of the high-level radioactive waste generated by the Nation's nuclear reactor power plants. None of the high-level radioactive waste which would be stored in a repository at Yucca Mountain is produced in Nevada.

Nevada's principal industries are concerned with tourism, recreation and gaming. These industries rely heavily on visitors from other states and countries. Other states and countries have similar industries that compete with Nevada for tourists and the recreating public. These industries are highly competitive and depend substantially on a favorable image. Nevada's visitors expect a safe and

environmentally sound location to visit.

The stigmatization and negative imagery associated with a high-level radioactive waste repository, particularly in terms of its popular media characterization as a "nuclear dump," tend to dissuade visitors from selecting Nevada as a vacation choice. Other negative implications, when amplified by the media in various ways,[3] have caused and will continue to cause Nevada and its citizens economic damage.

Nevada, representing the popular will of the political community of citizens that live in Nevada, has exercised the power to protect its economy and environment by enacting two legislative resolutions which state the Nevada Legislature and Governor's opposition to

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[3]Media amplification includes the media's penchant to dramatize and sensationalize in the nuclear context, for instance, what would ordinarily be a relatively incidental or minor accident. Because it pertains to nuclear waste, an event becomes a topic of enhanced significance.

the siting of a high-level radioactive waste facility at Yucca Mountain and by enacting a statute, NRS 459.910, which states:

> 1. It is unlawful for any person or governmental entity to store high-level radioactive waste in Nevada.
> 2. As used in this section, unless the context otherwise requires, "high-level radioactive waste" has the meaning ascribed to that term in 10 C.F.R. § 60.2.

The Ninth Circuit Court of Appeals has held that Nevada's attempted legislative veto of the development of the repository at Yucca Mountain is preempted by the Nuclear Waste Policy Act. App. 30.

The Ninth Circuit Court of Appeals identified the Property Clause, Art. IV, § 3, cl. 2, as the textual basis for Congress' authority to select Nevada's Yucca Mountain in the 1987 NWPA amendments. Nevada contends that the Property Clause does not entrust Congress with the power to accomplish the objectives of the NWPA. The Ninth Circuit Court of Appeals

ruling is an extreme departure from the existing precedents of this Court and conflicts with other applicable decisions of this Court. Furthermore, the Court of Appeals' judgment and opinion implicates important questions of federal law which should be settled by this Court.

The Ninth Circuit Court of Appeals extended this Court's dictum in *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) that, under the Property Clause, "[t]he power over the public lands thus entrusted to Congress is without limitations" to mean that the Property Clause, itself, is without limitations. The "power . . . thus entrusted" language of *Kleppe* was construed in *Pollard's Lessee v. Hagen et al.*, 44 U.S. (3 How.) 212, 224 (1845) as follows:

> Full power is given to Congress 'to make all needful rules and regulations respecting the territory or other property of the United States.' This authorized the passage of all laws necessary to secure the

> rights of the United States to the public lands, and to provide for their sale, and to protect them from taxation.

The Ninth Circuit Court's construction of the Property Clause departed dramatically from *Pollard's* limited authorization.

The Ninth Circuit Court held that the United States can make unlimited use of the public lands for the development of a facility for the disposal of privately produced hazardous and highly radioactive waste whether or not that type of facility is in violation of state law. By logical extension of the Court's holding, the Congress could chose to develop a brothel on BLM land in a state where prostitution was unlawful under authority of the Property Clause.

The lower court's analysis, if correct, could have been the basis for many of this Court's strongest precedents. The National Bank case, for instance, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.)

316 (1819), could have been decided on the simple proposition that the United States owned the commercial lot in Maryland, and could, therefore, build and operate a bank under authority of the Property Clause. If allowed to stand, the Ninth Circuit Court of Appeals' construction of the Property Clause would reduce most of Article I, section 8 of the Constitution to verbal surplusage.

The lower Court's suggestion that the Congress has absolute power to devote the public lands to private purposes is not supported by our history or this Court's precedents. In *Van Brocklin v. Tennessee*, 117 U.S. 151, 158 (1886), this Court stated that:

> The United States do not and cannot hold property as a monarch may for private or personal purposes.

The Ninth Circuit Court of Appeals' opinion raises concerns about the role which federal power plays over property

matters in the federal system. The decisions of this Court clearly require that an enumerated power, other than the Property Clause, must be demonstrated before the Federal Government may condemn property for a particular federal purpose in the federal courts. *See, e.g., Kohl et al. v. United States*, 91 U.S. 367, 371-72 (1875). *See also, United States v. Gettysburg Ry.*, 160 U.S. 668, 679-83 (1896). If private land in Deaf Smith County, Texas, were condemned as the site for the proposed repository, a delegated power other than the Property Clause would have to be advanced to justify the condemnation. Considerations of federalism would require that whatever federal power exists to site and develop a repository in Texas must be applicable in Nevada as well.

The Property Clause cannot reasonably be suggested as the underlying authority

for Congress' enactment of the Nuclear Waste Policy Act in 1982 because a number of potentially acceptable sites, and an untold number of potential sites for a repository, were located on private lands. It is inconceivable that when the NWPA was amended in 1987 that the Property Clause, retroactively, became the authority for the entire legislative scheme. The answer, of course, is that Congress had no such intent, nor was mention made of the regulation of federal property in any of the congressional reports or in the 1982 Act or the 1987 amendments.

One third of the Nation's land is federal property. *See, e.g., One Third of the Nations' Land*, a Report to the President and to the Congress by the Public Land Law Review Commission (Washington D.C., June, 1970). The Ninth Circuit Court of Appeals opinion, if allowed to stand, will have a dispro-

portionate, adverse effect on the public land states. Nevada land is more than 87 per cent federally owned. Nevada's governmental prerogatives will be severely affected by the Ninth Circuit Court of Appeals' decision in a variety of other public land contexts involving land, wildlife and water matters.

The Ninth Circuit Court of Appeals correctly recognized that Congress may, under the Property Clause, "control the occupancy and use of the public lands, *Utah Power & Light Co. v. United States*, 243 U.S. 389, 405 (1917), protect the public from hazardous conditions on those lands, *Camfield v. United States*, 167 U.S. 518, 525 (1897) and regulate wildlife on those lands. *Kleppe v. New Mexico*, 426 U.S. at 540-41." App. 14. It is a giant conceptual step, however, to decree that the Property Clause empowers Congress to develop a federal facility for the

disposal of privately produced high-level radioactive waste on the public lands in violation of state law.

The Ninth Circuit Court of Appeals discussed the development of a high-level radioactive waste facility as a regulation of public land. Whether the establishment of a federal facility, unrelated to the management of public lands themselves, may be regarded as a regulatory power of the Property Clause is a question of great importance to the public land states. This Court should grant the writ of certiorari to settle this important question.

B. Equal Footing Doctrine

Having selected the Property Clause as the textual basis for Congress' authority to enact the NWPA, as amended, the Ninth Circuit Court of Appeals gave the NWPA preemptive effect over the State's refusal to accept the repository

under resolutions and laws enacted pursuant to the State's historic police powers.

While it is true that the states are not on a parity in terms of federal land ownership, they are on an equality in terms of political rights, sovereignty, and the exercise of jurisdiction. This Court has never suggested that aspects of a state's sovereignty and jurisdiction within the grant of the equal footing doctrine were displaced by the Property Clause. In fact, precisely the opposite is suggested by *Pollard's Lessee v. Hagen et al., supra*, 44 U.S. (3 How.) 212, 230 (1845) and its progeny. In *Oregon v. Corvallis Sand and Gravel Co.*, 429 U.S. 363 (1977), this Court held that, as to submerged lands acquired under the equal footing doctrine, states had the power to establish general rules of property law which may be used to displace federal

ownership of lands or lands acquired pursuant to a federal grant where a navigable river subsequently meanders in its channel. This Court expressly overruled *Bonnelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973), which had held that the title conferred by the equal footing doctrine should be governed by federal common law. If the Property Clause was capable of preempting state law as to sovereignty and jurisdiction over lands that had passed to the states under the equal footing doctrine, *Corvallis* would have been decided differently, but as this Court noted:

> [I]n *Pollard's Lessee* itself the equal footing doctrine resulted in the State's acquisition of title notwithstanding the efforts of the Federal Government to dispose of the lands in question in another way.

Id. at 371.

This Court's holding in *Pollard's Lessee* was based on state sovereignty rather than a particular class of

property. This Court held that the United States did not have the right "to deprive the states of the power to exercise a numerous and important class of police powers." *Pollard's Lessee* at 230. In *United States v. Oregon*, 295 U.S. 1, 14 (1935) this Court established the over-arching principle that connects a state's ownership of the beds of navigable waters with the state's sovereignty:

> Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign of the lands to be held in private ownership or transfer of sovereignty itself.

The Ninth Circuit Court of Appeals correctly noted that "the professed motivation for Nevada's legislative veto is the economic and environmental effects of nuclear waste disposal . . . ." App. 31. The protection of a state's environment and economy represent historic police

power concerns supported by the constitutional grant of political rights and sovereignty contemplated by the equal footing doctrine. *See, e.g., Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 206 (1983). Exercising its municipal sovereignty, the State of Nevada enacted a statute, NRS 459.910, which even-handedly prohibits the storage of *all* high-level radioactive waste in Nevada by private as well as governmental entities. *Compare Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

The states, even though initially unequal in terms of economic stature or standing, nevertheless, under the constitutional grant of the equal footing doctrine, enjoy "parity as respects political standing and sovereignty" (*United States v. Texas*, 339 U.S. 707, 716 (1950)) to enable them to protect what economic

advantages they have been capable of developing. No case decided by this Court has supported, even conceptually, the application of the Property Clause in the manner suggested by the Ninth Circuit Court of Appeals, i.e., to displace a state's power to enact protective legislation based on economic or environmental concerns. *See, e.g., Kansas v. Colorado*, 206 U.S. 46, 91-92 (1907); *cf. Pacific Gas and Electric Co. v. State Energy Resources & Development Comm'n, supra.* If the Ninth Circuit's analysis is allowed to stand, environmentally dangerous and unacceptable activities conducted on federal lands by federal agents and instrumentalities could escape state imposed environmental restrictions.

Kleppe v. New Mexico, 426 U.S. 529 (1976) is not inconsistent. *Kleppe* involved the protection of federal property, the wild and free roaming horses

and burros on the public lands, which Congress had identified as "an integral part of the natural system of the public lands." *Id.* at 535. Under the Property Clause, Congress has the power to protect its property[4] and to dispose of it without reference to a purpose under another enumerated power. *Cf., Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 330, 340 (1936).

This Court should grant review to address the important question of the extent to which the Property Clause may preempt legitimate exercises of a state's police powers in the circumstances of this case, *i.e.*, the development of a federal facility on public lands for privately produced hazardous and highly radioactive waste.

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[4]High-level radioactive waste is not property of the United States. Title is to be acquired at the time of the commencement of the operation of a repository. *See* Section 302(a)(5) of the NWPA, 42 U.S.C. § 10222(a)(5).

C. Tenth Amendment

In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819), Chief Justice Marshall wrote:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.

Our purpose, in reference to Marshall's famous declaration on behalf of this Court, is to focus on the means which was used in selecting Nevada and whether the use of such means is consistent with the letter and spirit of the Constitution, in particular, the Tenth Amendment.

In *South Carolina v. Baker*, 485 U.S. 505, 511 n.5 (1988), this Court continued to speak approvingly of federalism and the part the Tenth Amendment plays in federalism concerns:

> We use the Tenth Amendment to encompass any implied constitutional limitation on Congress' authority to

> regulate state activities, whether grounded in the Tenth Amendment itself or in principles of federalism derived generally from the Constitution.

In *Baker*, this Court further suggested that the Tenth Amendment is violated when a state is "deprived of the right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless." *Id.* at 513.

In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 550-51 (1985), the majority stated, in overruling *National League of Cities v. Usury*, 426 U.S. 833 (1976):

> Apart from the limitation on federal authority inherent in the delegated nature of Congress' Article I powers, the principle means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress.

The *Garcia* majority held that "State

sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Id.* at 552.

The Ninth Circuit Court of Appeals, adopting the "national political process" approach of the *Garcia* and *Baker* cases, dismissed Nevada's Tenth Amendment claims on the basis that "the tenth amendment does not protect a state from being outvoted in Congress." App. 22. The Court refused to recognize that the national political process operated in a defective way.

This case illustrates why *Garcia v. San Antonio Metro. Transit Auth.*, *supra*, and *South Carolina v. Baker*, *supra*, are wrong. If, as the Ninth Circuit Court held, *Baker and Garcia* uphold a national political process that can victimize one of its politically weakest members because

that member is defenseless in terms of political influence, then *Garcia* and *Baker* were wrongly decided and should be expressly overruled.

The rational of the *Garcia* and *Baker* cases suggest that the means by which the national political process protects the states is political accountability. *See, e.g., La Pierre, Political Accountability In The National Political Process - The Alternative To Judicial Review Of Federalism Issues*, 80 Northwestern L. R. 577, 583 (1985). Political accountability may provide "a comprehensive, systematic explanation and justification of Congress' power to control the allocation of authority between the states and the nation." *Id.* Political accountability, however, is deficient when used to justify the case where forty-nine of the states "gang up" on a single state to relieve themselves of an unwanted burden. The

members of Congress are not politically accountable to the object of their discriminatory legislation, the residents of Nevada. The accountability they owed to their own constituents and to political action committees bolstered, rather than checked, their unbridled exercise of power over Nevada's interests. No deference is owed to the national political process under these circumstances.

Representatives of states who were interested in removing candidate sites in their own states from consideration as repositories spear-headed the effort in the conference committee to victimize Nevada. The Ninth Circuit Court of Appeals correctly noted that "This legislation [the 1987 amendments] was drafted by the Conference Committee. The House version of the budget bill had no provisions amending the NWPA." App. 9. Bennett Johnston, United States Senator

from Louisiana, had caused Amendment No. 1263 to be attached to the Omnibus Budget Reconciliation Act (H.R. 3545). It was this bill (S. 1920) that was referred to the Conference Committee. Under applicable parliamentary procedure, the Senate's amendments to the Omnibus bill should have either been concurred in or disagreement expressed in some way. A conference was called, however, without evidence of disagreement. Issues that can be discussed in conference are only those subject to disagreement. "The managers of a conference must confine themselves to the differences committed to them, . . . and may not include subjects not within the disagreements . . . ." *Jefferson's Manual* and *Rules Of The House Of Representatives*, § 5.46, House Document No. 96-398, 96th Congress, 2d Session. In violation of parliamentary procedure, the Senate's offer was rewritten to identify

Yucca Mountain as the only site to be characterized and adopted behind the closed doors of the Conference Committee rather than exposed to additional open and public debate. The political process was defective and left Nevada's representatives isolated and powerless to object to what had by then become a *fait accompli*.

The selection of Nevada by the Conference Committee as the only site to be characterized was submerged in the Omnibus Budget Reconciliation Act. The bundling of non-germane legislation which discriminates against a single state with an Omnibus budget bill offends both the letter and spirit of the bicameralism and presentment principles of Article I (Art. I, § 7, cl. 2) because neither the Congress nor the President can give line-item consideration to the subject matter of the conference committee's report. Bundling in this manner represents an

additional defect in the political process which left Nevada isolated and powerless.

This Court should review the lower Court's treatment of the Tenth Amendment and clarify or adjust its recent decisions in the interest of confirming the principles of federalism underlying the Tenth Amendment that are consistent with the letter and spirit of the Constitution.

II.
THIS CASE RAISES IMPORTANT ISSUES CONCERNING AN UNCONSENTING STATE'S LEGISLATIVE POWER TO VETO OR OTHERWISE DISAPPROVE THE SELECTION OF A SITE WITHIN ITS BORDERS FOR THE DISPOSAL BY THE FEDERAL GOVERNMENT OF PRIVATELY PRODUCED, DANGEROUS SUBSTANCES

A. Preemption

In previous sections of this petition, the State has presented reasons why this Court should grant the petition for writ of certiorari to review the basis for federal power to select a site for the development of a federal facility for the emplacement, forever, of privately produced high-level radioactive waste in

an unconsenting state. If, as the State contends, the power does not exist or is limited as contended, preemptive capability is not present. Even if the federal power were found to exist, and not subject to the limitations advanced, the important questions involving federal-state relationships which were discounted by the Ninth Circuit Court of Appeals should be addressed and settled by this Court.

The Ninth Circuit Court of Appeals determined that "Nevada's attempted legislative veto . . . is preempted by the NWPA." App. 30. The Court based its preemption analysis not on the proposition "that Congress has expressly preempted the field of nuclear waste disposal" (App. 30) but because Nevada's attempted legislative veto stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. App. 30.

The Court candidly recognized that

under this Court's holding in *Pacific Gas & Electric Co., supra*, a "California statute that conditioned the construction of a nuclear power plant . . . was not preempted by federal law because it was motivated by economic concerns." App. 30. The Court also recognized that this "Court concluded that the state law being challenged was not preempted by the federal laws regulating nuclear safety because it was motivated by economic concerns." App. 31. The Ninth Circuit Court of Appeals further recognized that "the professed motivation for Nevada's legislative veto is the economic and environmental effects of nuclear waste disposal." *Id.* Nevertheless, the Court held Nevada's attempted veto preempted.

By fixing on "conflict preemption" the Court appears to give controlling weight to the fact that Nevada's veto "has

the actual effect of frustrating Congress' intent." *Id.* The lower Court lost sight of the important fact, however, that the Federal Government is simply the surrogate or agent for the utilities. The utilities lobbied for the NWPA and were successful. They agreed, as Sections 111(a)(4), (5), and (b)(4), 42 U.S.C. § 10131(a)(4), (5) and (b)(4) provide, to pay for all costs of the federal program by the fee imposed on each kilowatt hour of power sold to their customers.[5] This fact should have modified the Court's "conflict preemption" analysis. The conflict simply does not implicate a federal interest. Without "conflict preemption" Nevada is in an analogous situation to California in the

---

[5]The State contended in the Court below that the federal repository program as established under the NWPA could not be authorized under the General Welfare Clause because it is privately funded. The payment of the costs of the program by the utilities rather than from the general revenue conflicts with the uniformity requirement of Art. I, § 8, cl. 1. *See, e.g., Head Money Cases*, 112 U.S. 580, 595-96 (1884). The Respondents acquiesced as to this point in the Court below.

P.G. & E. case. This Court should grant review and clarify what appears on its face to involve a clear disparity of treatment in terms of the preemption of state legislative enactments based upon identical state interests.

B. The Efficacy of Nevada's Veto - The Guarantee Clause

The Ninth Circuit Court of Appeals recognized that Nevada has the right under Section 116(b), 42 U.S.C. § 10136(b), to submit a notice of disapproval "not later than 60 days after the date that the President recommends such site to Congress." App. 25. The President's approval of the 1987 amendments was a *de facto* recommendation. Yucca Mountain was then in immediate jeopardy. Delay would have been futile, given the legislative history of the 1987 amendments. Moreover, it would have been irresponsible to permit the expenditure of billions of dollars of

ratepayers' contributions when Nevada clearly anticipated that it would transmit a notice of disapproval at the end of the process.

Nevada's veto was not preempted because the NWPA invited it. The only question, therefore, was the timeliness of the transmittal of the notice of disapproval. The Court recognized the basis of the State's claim that the notice of disapproval should be deemed timely and effective as follows:

> The Nevada legislature meets on a biennial basis for approximately five to six months. Nev. Const. art. 4, § 2. Because of this schedule, Nevada asserts that the Secretary and the President may time the recommendation of Yucca Mountain as the repository site at a time when the legislature is not in session. The Governor may then refuse to call a special session of the legislature, pursuant to Nev. Const., art. 5, § 9, and then decline to submit a notice of disapproval. By doing so, the Secretary and the President will deprive the citizens of Nevada of the "Republican Form of Government" guaranteed by Article IV, section 4 of the Constitution "because their representatives in the Legislature

> may be deprived of the opportunity to vote on the measure at the Governor's option." Petitioners' Opening Brief at 51.

App. 26. The lower Court summarily denied Nevada's contention that the timing constraints were constitutionally defective because the State's above-referenced "claim is wholly speculative" and "challenges to legislation based on the Guarantee Clause are not justiciable." App. 26. Nevada's claim is based on probabilities, not speculation. If the recommendation occurs, it is at least four times more probable that it will be made when the Legislature is out of session. Should this happen, the Legislature will be powerless, on its own, to submit a notice of disapproval.

This Court should consider whether Section 116, as applied to Nevada's circumstance, is a law that infringes on a State's ability to decide on the basis of a guaranteed Republican form of government

"who has the authority to act on behalf of government," *Morgan v. South Bend Community School Corp.*, 797 F.2d 471-77 (7th Cir. 1986); or "the power to structure their internal government," *Bradley v. School Bd.*, 462 F.2d 1058, 1068 (4th Cir. 1972); *affirmed by an equally divided Court*, 412 U.S. 92, 93 (1973); or "the exclusive power to allocate the functions of the executive, judicial, and legislative processes as they wish," *United States v. Mantel*, 415 F. Supp. 1025, 1031 (D. Md. 1976).

This Court should grant review to settle the important question of whether the Republic is best served by reinforcing the ability of independent state governments to check the abuses of power by the Federal Government by the full enjoyment of their Republican forms of government. *See, e.g., Garcia v. San Antonio Metro., supra*, 571 (Powell, J. dissenting); *FERC*

v. Mississip, 456 U.S. 742, 790 (1982) (O'Connor, J. dissenting in part.) This Court should reconcile state autonomy and national power by recognizing that the federalism principles rooted in the Guarantee Clause accord each a proper role in the federal system. *See, e.g., Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 2, 70-78 (1988) (arguing that judicial enforcement of the Guarantee Clause is proper); *South Carolina v. Baker, supra*, at 531 (O'Connor, J. dissenting).

III.

THIS CASE RAISES IMPORTANT QUESTIONS REGARDING THE LEVEL OF DISCRETION WHICH THE CONGRESS MAY DELEGATE OR HAS DELEGATED TO EXECUTIVE DEPARTMENT OFFICERS RELATIVE TO WHEN A SITE SHOULD BE DISQUALIFIED FROM FURTHER CONSIDERATIONS FOR HIGH-LEVEL RADIOACTIVE WASTE SITE PURPOSES

The Ninth Circuit Court of Appeals correctly recognized that: "As amended Section 10133(b) . . . makes clear, the

guidelines developed by the Secretary pursuant to section 10132(a) are to be utilized to determine the suitability of Yucca Mountain for the location of the repository." App. 33. The Court also correctly noted Nevada's contention "that the Secretary has a judicially enforceable duty to determine, throughout the site characterization process, whether any disqualifying conditions exist."

The Ninth Circuit Court of Appeals held that "the statute appears to commit the timing of the Secretary's decision regarding disqualifying conditions to his discretion." Nevada contends that the lower Court placed too narrow a construction on the statutory scheme. Characterization of Yucca Mountain may cost as much as $3 billion dollars according to the latest estimates. It defies common understanding that Congress intended to afford the Secretary of Energy

the sole discretion to continue pursuing site characterization activities at Yucca Mountain without a procedural methodology in place to identify and evaluate whether Yucca Mountain is unsuitable for development of a repository based on evidence that becomes available during the investigative studies.

Congress delegates its legislative power subject to the limitations of a prescribed standard or intelligible principle. *See, e.g., Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Congress specified with precision the content of the guidelines which it directed the Secretary of Energy to promulgate. Section 112(a), 42 U.S.C. § 10132(a) of the NWPA. The guidelines are set forth at 10 C.F.R. Part 960.

When Congress amended the NWPA in 1987, it added certain provisions to Section 113(c), 42 U.S.C. § 10133(c), which provide in part:

> (3) If the Secretary at any time determines the Yucca Mountain site to be unsuitable for development as a repository, the Secretary shall
>
> (A) terminate all site characterization activities at such site;
>
> * * * * *
>
> (F) report to Congress
>
> . . . .

The reason Congress added the foregoing provisions to the NWPA was directly related to its recognition that by proceeding to characterize a single site, it must institute precautionary measures in anticipation of the possibility that the single site may prove unsuitable. Congress amended the NWPA with the intent that it would be notified by the Secretary of Energy as to a determination of unsuitability as early as possible in the process of site characterization.

The NWPA, as amended, clearly established the Secretary's duty to have and implement a process during site characterization for the ongoing evaluation of whether the Yucca Mountain site should be determined unsuitable pursuant to the site recommendation guidelines (10 C.F.R. Part 960) required by the Act. The NWPA, as amended, restricts site characterization activities to those "the Secretary *considers necessary* to provide the data required for *evaluation* of the suitability" of the site for a license application to the NRC, and for the site EIS. (Emphasis added). 42 U.S.C. § 10133(c). It requires him to report not less than once every six months "on the nature and extent of such activities and the *information developed* from such activities." (Emphasis added). 42 U.S.C. § 10133(b).

The *information developed* must include an *evaluation* of whether any 10 C.F.R. Part 960 disqualifying conditions have been found from the data in order for the Secretary to determine what, if any, further activities he *considers necessary*. Therefore, when and how the Secretary makes his suitability evaluation is not a matter the NWPA, as amended, leaves to his discretion. Congress clearly intended that he have a methodology to guide his consideration, and he must report the results of his ongoing considerations at least every six months.

This Court should grant review of the lower Court's opinion to clarify the important question involving the standard by which Congress delegated its legislative authority in this case.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court

grant the petition for writ of certiorari.

Respectfully submitted,

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90-92

No. .....

Supreme Court, U.S.
FILED
DEC 17 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF NEVADA, et al.,

Petitioners,

v.

JAMES D. WATKINS, Secretary of the United States Department of Energy, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS APPENDIX

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATE OF NEVADA; RICHARD H. BRYAN, Governor of Nevada; PAUL LAXALT, United States Senator; CHIC HECHT, United States Senator; BARBARA VUCANOVICH, United States Representative in Congress; HARRY REID, United States Representative in Congress,

Petitioners,

v.

JAMES D. WATKINS, Secretary of the United States Department of Energy,*

Respondent.

No. 86-7308

Nuclear Waste Policy Act

*James D. Watkins, Secretary of the United States Department of Energy substituted for former Secretary Herrington, Fed. R. App. P. 43(c)(1).

STATE OF NEVADA,

Petitioner,

v.

U.S. DEPARTMENT OF ENERGY; JAMES D. WATKINS, Secretary of The United States Department of Energy,

Respondents,

ARIZONA PUBLIC SERVICE COMPANY; BALTIMORE GAS & ELECTRIC COMPANY; CAROLINA POWER & LIGHT COMPANY; CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.; DETROIT EDISON COMPANY; DUKE POWER COMPANY; DUQUESNE LIGHT COMPANY; FLORIDA POWER & LIGHT COMPANY; GULF STATES UTILITIES COMPANY; IOWA ELECTRIC LIGHT & POWER COMPANY; MADISON GAS AND ELECTRIC COMPANY; NEW YORK POWER AUTHORITY; NORTHEAST UTILITIES; NORTHERN STATES POWER COMPANY; PENNSYLVANIA POWER & LIGHT COMPANY; PUBLIC SERVICE ELECTRIC & GAS COMPANY; UNION ELECTRIC COMPANY; VIRGINIA POWER; WISCONSIN ELECTRIC POWER COMPANY; WISCONSIN POWER AND LIGHT COMPANY; and WISCONSIN PUBLIC SERVICE CORPORATION,

Intervenors.

No. 90-70004

OPINION

Petition toReview a Decision of the
Secretary of the United States Department of Energy

Argued and Submitted
August 16, 1990—San Francisco, California

Filed September 19, 1990

Before: J. Clifford Wallace, Arthur L. Alarcon and
Charles Wiggins, Circuit Judges.

Opinion by Judge Alarcon

SUMMARY

Constitutional Law/Administrative Law

Affirming a decision of the Secretary of the U.S. Department of Energy, the court of appeals held that the Secretary's decision to continue site characterization of a potential radioactive waste repository in Nevada was not unconstitutional or otherwise contrary to law.

The State of Nevada challenged the Secretary of Energy's decision to continue investigation of Yucca Mountain as a potential site for the location of a national high-level radioactive waste repository under the NWPA. Nevada argued that congressional selection of the site was unconstitutional, making Energy's continued site investigation contrary to law. Nevada also contended that its legislative veto of the proposed site was not preempted by federal law. Nevada also alleged that Energy was required to promulgate regulations governing the timing of site disqualification decisions. The Secretary of Energy was authorized to conduct site characterization activities. Upon completion of such, the Secretary was required to recommend one to the President for nuclear

waste repository development. The President was required to submit his approved recommendation to Congress. Nevada at this point could submit its notice of disapproval to Congress. Congress then had 90 days in which to override Nevada's notice of disapproval by passage of a joint resolution.

[1] Because Yucca Mountain in Nevada is federally owned land subject to Congress' plenary power of regulation, the Property Clause of the federal constituiton provided a sufficient basis for Congress' authority to select it as the sole site to be characterized for possible development as a nuclear waste site. [2] Under the Constitution's Enclave Clause, Nevada's consent or cession of the land in question for the proposed waste site was not required when Congress acted under its plenary authority to regulate public lands. [3] Similarly, the equal footing doctrine was not a restriction on Congress' power to enact regulations concerning the siting of a national nuclear waste repository under the Property Clause. That power is delegated to Congress by the Constitution. [4] The federal Privileges and Immunities Clause did not prevent congressional characterization of the site. That clause is a limitation on the powers of the states, not on those of the federal government. [5] The tenth amendment does not protect a State from being outvoted by Congress. Nevada did not point to any defect in the political process that led to the congressional selection of Yucca Mountain as a proposed nuclear waste site. [6] Congressional enactments do not offend the Port Preference Clause, even if they result in some detriment to the port of a state, where they occur as an incident to some otherwise legitimate government act regulating commerce. [7] The court disagreed with Nevada's contention that the timing provisions of the NWPA governing submission of a notice of disapproval were unconstitutional. Challenges to legislation based on the Guarantee Clause are not justiciable. [8] In addition, the effectiveness of Nevada's disapproval to the site characterization was not ripe for review. The President had not yet recommended Yucca Mountain to Congress for selection as the nuclear waste repository. [9] There was no

implied repeal of presidential recommendation to Congress as a prerequisite to Nevada's notice of disapproval in 1987 amendments to NWPA. [10] Nevada's attempted legislative veto of the Secretary's site characterization activities stood as an obstacle to the accomplishment of Congress' purposes and objectives. Any state legislation that frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause. [11] Because the Secretary was not required to promulgate regulations governing the timing of a disqualification decision, judicial review of the decision not to do so was not available under NWPA. [12] The Secretary's failure to provide for the timing of his disqualification decisions, even if final and subject to judicial review under the APA, were nonetheless not reviewable because the decision was committed to the agency's discretion by law.

COUNSEL

Richard B. Stewart, Assistant Attorney General, Peter R. Steenland, Jr., and John A. Bryson, Department of Justice, Washington, D.C., for the respondent.

Brian McKay, Attorney General, Harry W. Swainston, Deputy Attorney General, Carson City, Nevada, for the petitioners.

Jay E. Silberg and Mindy A. Buren, Shaw, Pittman, Potts & Trowbridge, Washington, D.C., for the intervenors.

OPINION

ALARCON, Circuit Judge:

The State of Nevada, Richard Bryan, Paul Laxalt, Chic Hecht, Barbara Vucanovich, and Harry Reid (Nevada) chal-

lenge the Secretary of Energy's decision to continue investigation of Yucca Mountain, Nevada as a potential site for the location of a national high-level radioactive waste repository, pursuant to the Nuclear Waste Policy Act of 1982 (NWPA), Pub. L. No. 97-425, 96 Stat. 2211 (1983) (now codified as amended at 42 U.S.C. §§ 10101-10270). The NWPA establishes a comprehensive process for determining the suitability of Yucca Mountain as a repository site. Nevada asserts that the Secretary's decision to continue site investigation is contrary to law because Congress' selection of Yucca Mountain was not constitutional. Nevada also contends that it effected a valid legislative veto of the selection of Yucca Mountain and that this action is not preempted by federal law. Nevada finally contends that the Secretary must promulgate regulations that govern the timing of site disqualification decisions. We disagree and affirm.

PERTINENT FACTS

Until 1954, the use, control, and ownership of all nuclear technology were subject to a federal monopoly. *English v. General Elec. Co.*, 110 S. Ct. 2270, 2276 (1990). The Atomic Energy Act of 1954, 68 Stat. 919 (1954) (codified as amended at 42 U.S.C. §§ 2011-2281), "stemmed from Congress' belief that the national interest would be served if the Government encouraged the private sector to develop atomic energy for peaceful purposes under a program of federal regulation and licensing." *English v. General Elec. Co.*, 110 S. Ct. at 2276. The Act provided for private construction, ownership, and operation of commercial nuclear reactors under the supervision of the Atomic Energy Commission (AEC). *Id.*

Although the AEC, and its successor agency, the Nuclear Regulatory Commission (NRC), were largely successful in promoting the construction of commercial nuclear reactors, these agencies were not successful in resolving the need for safe disposal of the by-products of the generation of nuclear energy. H.R. Rep. No. 491, 97th Cong., 2d Sess. 28, *reprinted*

in 1982 U.S. Code Cong. & Admin. News 3792, 3794-95. To address this pressing national problem, Congress enacted the NWPA. 42 U.S.C. § 10131 (1982 & Supp. V 1987).

As originally enacted, the NWPA required the Secretary to issue general guidelines to serve as the primary criteria for the nomination of five sites that were suitable for "site characterization," or study as repository sites. *Id.* § 10132(a) (1982). As defined by the NWPA,

> The term "site characterization" means —
>
> > (A) siting research activities with respect to a test and evaluation facility at a candidate site; and
> >
> > (B) activities, whether in the laboratory or in the field, undertaken to establish the geologic condition and the ranges of the parameters of a candidate site relevant to the location of a repository, including borings, surface excavations, excavations of exploratory shafts, limited subsurface lateral excavations and borings, and in situ testing needed to evaluate the suitability of a candidate site for the location of a repository, but not including preliminary borings and geophysical testing needed to assess whether site characterization should be undertaken.

Id. § 10101(21) (1982 & Supp. V 1987). Congress provided that a detailed environmental assessment should accompany the nomination of each site. *Id.* § 10132(b)(1)(E) (1982). From these five sites, the Secretary was to recommend three to the President for site characterization. *Id.* § 10132(b)(1)(B) (1982). The Secretary was authorized to conduct site characterization activities, pursuant to detailed public site charac-

terization plans, at each site approved by the President. *Id.* § 10133(a) (1982). Upon the completion of site characterization at each site, the Secretary was required to recommend a single site to the President for development as a national high-level nuclear waste repository. *Id.* § 10134(a)(1) (1982). If the President approved the recommendation, he was required to transmit it to Congress. *Id.* § 10134(a) (1982). At this point, the State within which the recommended site was located could submit a notice of disapproval to Congress. *Id.* § 10136 (1982 & Supp. V 1987). Congress then had ninety days during its first period of continuous session in which to override the State's notice of disapproval by passage of a joint resolution. *Id.* § 10135(c) (1982 & Supp. V 1987).

Pursuant to this statutory scheme, the Secretary issued general guidelines for the recommendation of repository sites. 49 Fed. Reg. 47714-70 (Dec. 6, 1984) (codified at 10 C.F.R. § 960.5 (1989)). On December 14, 1984, the Secretary issued draft environmental assessments for nine potentially acceptable sites in six states — Louisiana, Mississippi, Nevada, Texas, Utah, and Washington. 49 Fed. Reg. 49540-41 (Dec. 20, 1984). On May 27, 1986, the Secretary nominated five sites for site characterization, one each in Mississippi, Texas, Utah, Nevada, and Washington. 51 Fed. Reg. 19783-84 (June 2, 1986).

On May 28, 1986, Nevada filed case No. 86-7308, in which it sought review by this court of the Secretary's decision to nominate Yucca Mountain, Nevada, for site characterization. Nevada contended that the Secretary was required to establish jurisdiction over Yucca Mountain by State consent or cession, pursuant to the Federal Enclave Clause, U.S. Const. art. I, § 8, cl. 17, and the applicable NRC regulation, 10 C.F.R. § 60.121. Nevada sought declaratory and injunctive relief requiring the Secretary to obtain the Nevada legislature's consent before pursuing site characterization at Yucca Mountain.

On December 22, 1987, Congress amended the NWPA by certain provisions of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-202, 101 Stat. 1329 (1987), and Pub. L. No. 100-203, 101 Stat. 1330 (1987) (the 1987 NWPA amendments). The 1987 NWPA amendments designated Yucca Mountain as the sole site to be characterized for possible development as a repository site. 42 U.S.C. § 10172 (Supp. V 1987). This legislation was drafted by the Conference Committee. The House version of the budget bill had no provisions amending the NWPA. H.R. Conf. Rep. No. 495, 100th Cong., 1st Sess. 775-76, *reprinted in* 1987 U.S. Code Cong. & Admin. News 2313-1245, 2313-1521 to -22. The procedures for site characterization established in sections 10133 and 10134 were made applicable only to Yucca Mountain. 42 U.S.C. §§ 10133-10134 (Supp. V 1987). The State of Nevada's right to submit a notice of disapproval to Congress, *id.* § 10136 (1982 & Supp. V 1987), subject to congressional override, was unchanged. *Id.* § 10135 (1982 & Supp. V 1987).

In December 1988, the Secretary issued his final site characterization plan. This plan sets forth the proposed site characterization activities at Yucca Mountain. Pursuant to Nevada law, the Secretary submitted applications for various environmental permits to the appropriate Nevada state agencies. *See* 42 U.S.C. § 7418(a) (1982) (permitting implementation of state plans for particulate matter under the Clean Air Act); 42 U.S.C. §§ 300f to 300j-10 (permitting states to enact an Underground Injection Control Program pursuant to the Safe Drinking Water Act).

During the pendency of those applications, the Nevada legislature passed two joint resolutions. Assembly Joint Resolution 4, passed on January 17, 1989, expresses the legislature's "adamant opposition to the placement of a high-level nuclear waste repository in the State of Nevada." Assembly Joint Resolution 6, passed on January 23, 1989, provides that the federal government shall not establish a repository at Yucca Mountain "without the prior consent of the Nevada Legisla-

ture or a cession of jurisdiction pursuant to chapter 328 of the Nevada Revised Statutes, which consent and cession are hereby refused." Assembly Joint Resolution 6 was premised, in part, on the potential adverse effects on Nevada's economy and environment of siting a nuclear waste repository in that state. On April 19, 1989, both resolutions were transmitted to the President and both Houses of Congress. Congress took no action in response to the transmittal.

On June 22, 1989, the Nevada legislature passed Assembly Bill 222, which was signed into law by the Governor of the State of Nevada on July 6, 1989. Nev. Rev. Stat. § 459.910 (1989). This statute states that "[i]t is unlawful for any person or governmental entity to store high-level radioactive waste in Nevada." *Id.*

In response to a request by the Governor, the Attorney General of the State of Nevada issued an opinion on November 1, 1989, in which he concluded that the State had submitted a valid notice of disapproval pursuant to 42 U.S.C. § 10136 by transmitting Assembly Joint Resolutions 4 and 6 to the Congress, and that the Congress had acceded to the State's disapproval by its inaction. Accordingly, the Attorney General advised the Governor that the Secretary's permit applications were moot and that he should "direct the agencies considering such permits to consider action upon the applications as unnecessary."

On November 14, 1989, the Governor wrote to the Secretary, contending that a review of available information demonstrated that the Yucca Mountain site was unsuitable and, therefore, that site characterization should cease. The Governor also asserted that Nevada had effectively vetoed the selection of the site.

On November 29, 1989, the Secretary reported to Congress that the site characterization at Yucca Mountain should proceed. The Secretary, as part of a restructuring of the site char-

acterization program, recommended that a near-term program of surface-based testing be undertaken to provide an early evaluation of the site's suitability. The Secretary also informed Congress that this proposal was intended to be responsive to Nevada's concerns.

On December 26, 1989, the state administrative agencies returned the Secretary's applications for the required environmental permits. Citing the actions of the Nevada legislature and the Attorney General's November 1, 1989 opinion letter, the agencies stated that "these applications are now moot because the Yucca Mountain Repository is prohibited."

On January 5, 1990, Nevada filed a petition for review of administrative action in case No. 90-70004. Nevada challenged the Secretary's failure to terminate the site characterization activities, contending that the State had submitted a valid notice of disapproval and that current information disqualified the site. On February 2, 1990, a motions panel of this court ordered case No. 90-70004 consolidated with case No. 86-7308.

On February 28, 1990, the Secretary rejected the Governor's November 14, 1989 demand to terminate site characterization. The Secretary reassured the Governor that site characterization would terminate if investigation indicated that Yucca Mountain was unsuitable, but he reiterated that "only site characterization can produce the scientific data needed to determine whether or not the site is suitable."

On August 10, 1990, six days before oral argument in this consolidated appeal, the Attorney General of the State of Nevada submitted a letter to the Clerk of this court that states "that most of the constitutional arguments advanced by my office are either not ripe for adjudication, not germane to the issues properly before the Court in these matters, or not well taken in the context of these particular cases." The Attorney General advised the Clerk that he did not intend "to pursue

in argument" these constitutional issues. On the same date, the Secretary also submitted a letter to the Clerk in which he opposed the withdrawal of any of the constitutional issues before this court because "[m]any of the same arguments that General McKay now seeks to withdraw from resolution are also pending in related litigation before District Judge McKibben wherein the state is the defendant and Secretary Watkins is the plaintiff." We do not construe the Attorney General's letter to the Clerk as a motion to strike or withdraw his constitutional claims. Accordingly, we shall determine the merits of each contention asserted by the State of Nevada in its briefs.

JURISDICTION

We have jurisdiction over these consolidated petitions for review pursuant to 42 U.S.C. § 10139(a)(1). Section 10139(a)(1) provides, in pertinent part:

> (1) Except for review in the Supreme Court of the United States, the United States courts of appeals shall have original and exclusive jurisdiction over any civil action —
>
> > (A) for review of any final decision or action of the Secretary, the President, or the Commission under this part;
> >
> > (B) alleging the failure of the Secretary, the President, or the Commission to make any decision, or take any action, required under this part;
> >
> > (C) challenging the constitutionality of any decision made, or action taken, under any provision of this part . . . .

42 U.S.C. § 10139(a)(1)(A)-(C) (1982). A civil action for judicial review must be brought no later than the 180th day after

the date of the decision or action or failure to act challenged in the action. *Id.* § 10139(c). The Secretary's challenged failure to act occurred on November 29, 1989. This petition was filed on January 5, 1990. Therefore, Nevada's petitions for review are timely.

DISCUSSION

We review the Secretary's construction of the NWPA de novo, "in the context of the entire statutory scheme enacted by Congress to cope with the pressing problem of nuclear waste disposal." *Nevada v. Herrington,* 827 F.2d 1394, 1396 (9th Cir. 1987). We are mindful that "[a]lthough the judiciary is the final arbiter of issues of statutory construction, an administrative agency's interpretation of a statute it is charged with administering is accorded substantial deference." *Seldovia Native Ass'n v. Lujan,* 904 F.2d 1335, 1342 (9th Cir. 1990).

I. *Congress' Constitutional Authority to Enact the 1987 NWPA Amendments*

Nevada asserts that Congress did not have the constitutional authority to enact the 1987 amendments to the NWPA and, thus, the Secretary's decision to continue site characterization activities at Yucca Mountain is contrary to law. Congress, of course, possesses no power not derived from the Constitution. *Ex Parte Quirin,* 317 U.S. 1, 25 (1942); *Martin v. Hunter's Lessee,* 14 U.S. (1 Wheat.) 304, 326 (1816) ("The government, then, of the United States can claim no powers which are not granted to it by the Constitution, and the power actually granted, must be as such are expressly given, or given by necessary implication."). The Secretary points to three clauses that grant Congress the constitutional power to amend the NWPA: the Property Clause, U.S. Const. art. IV, § 3, cl. 2; the Commerce Clause, U.S. Const. art. I, § 8, cl. 3; and the Common Defense Clause, U.S. Const. art. I, § 8, cl. 1. Because the Property Clause provides a sufficient grant of

constitutional authority to validate the 1987 amendments, we do not consider the other constitutional provisions relied on by the Secretary.

A. *The Property Clause*

Pursuant to the Property Clause, "The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. Under this clause, " ' "[t]he power over the public land thus entrusted to Congress is without limitations." ' " *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580 (1987) (quoting *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (quoting *United States v. San Francisco*, 310 U.S. 16, 29 (1940))). Thus, it is well-established that "Congress exercises the powers both of a proprietor and of a legislature over the public domain." *Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976). Consistent with these powers, Congress may control the occupancy and use of the public lands, *Utah Power & Light Co. v. United States*, 243 U.S. 389, 405 (1917), protect the public from hazardous conditions on those lands, *Camfield v. United States*, 167 U.S. 518, 525 (1897), and regulate wildlife on those lands. *Kleppe v. New Mexico*, 426 U.S. at 540-41.

Nevada contends that, because the Property Clause is not a power of Congress enumerated in Article I, that clause cannot serve as a textual basis for Congress' power to enact the 1987 amendments. We considered a similar argument in *United States v. Vogler*, 859 F.2d 638 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 787 (1989). In *Vogler*, a placer miner contended that the federal government could regulate land within a state only to further one of the enumerated powers granted to Congress in Article I, section 8, and thus had no authority to require him to obtain a federal access permit before mining in a national park. *Id.* at 640-41. We rejected that argument as "contrary to well-settled Supreme Court precedent establishing the broad power granted to the govern-

ment in the property clause to regulate federal lands." *Id.* at 641. Thus, it was not necessary that Congress act pursuant to an enumerated power. *Id.*

The cases relied on by Nevada are not contrary to *Vogler.* In *Colorado v. Toll,* 268 U.S. 228 (1925), the Secretary of the Interior asserted exclusive jurisdiction to regulate the use of the state highways in Rocky Mountain National Park. *Id.* at 231. These lands were owned by the State prior to the creation of the park. The statute creating the park specifically excluded state-owned lands from its provisions. *Id.* at 230. As a result, the Court concluded that the federal government could not assert that it had exclusive jurisdiction to regulate those lands, because "the State has not surrendered its legislative power." *Id.* at 231.

Kansas v. Colorado, 206 U.S. 46 (1907), also involved an attempt by the federal government to regulate state-owned land. In that case, the Court rejected an argument by the United States that it had a right to intervene in a suit between Kansas and Colorado over the flow of the Arkansas River in order to enforce the Reclamation Act, which established a national program to irrigate arid lands. *Id.* at 87. The Court considered both the Commerce Clause and the Property Clause as possible sources of power authorizing Congress to pass the Act. The government conceded that the Commerce Clause was inapplicable, because the Arkansas River was nonnavigable at the affected points. *Id.* The Court then concluded that the Property Clause was inapplicable, because that clause was "limited to authority over the property belonging to the United States within [the States'] limits" and did not apply to state-owned river beds. *Id.* at 89, 93. As a result, the United States could not intervene to enforce the Reclamation Act. *Id.* at 93-94.

[1] These consolidated petitions for review do not involve state-owned land. Yucca Mountain is federally owned land, subject to Congress' plenary power to regulate its use. Thus,

the Property Clause provides a sufficient textual basis for Congress' authority to enact the 1987 NWPA amendments.

B. *Constitutional Limitations on Congress' Authority to Enact the 1987 NWPA Amendments*

The powers granted to Congress to legislate in specific areas "are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution." *Williams v. Rhodes,* 393 U.S. 23, 29 (1968). Nevada contends that a number of constitutional provisions restrict Congress' authority to enact the 1987 NWPA Amendments.

1. *The Federal Enclave Clause*

Nevada argues that the Federal Enclave Clause restricts Congress' authority to regulate federal land in Nevada because the state has not agreed to the cession of exclusive jurisdiction over the land to the federal government. The Federal Enclave Clause provides that

> The Congress shall have power ... To exercise exclusive legislation in all Cases whatsoever, over such District (not exceeding ten miles square) as may, by Cession of particular states, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in Which the Same Shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings ....

U.S. Const. art. I, § 8, cl. 17.

[2] The State's consent or cession is not required when Congress acts pursuant to its plenary authority to regulate the public lands:

> [W]hile Congress can acquire exclusive or partial jurisdiction over lands within a State by the State's consent or cession, the presence or absence of such jurisdiction has nothing to do with Congress' powers under the Property Clause. Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause.

Kleppe v. New Mexico, 426 U.S. at 542-43 (citations omitted); *see also Utah Power & Light Co. v. United States,* 243 U.S. at 404 ("True, for many purposes a State has civil and criminal jurisdiction over lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use and to prescribe in what manner others may acquire rights in them."). As a result, the Federal Enclave Clause does not abrogate Congress' authority to enact the NWPA, or to direct the Secretary to characterize Yucca Mountain as the potential repository under the NWPA.

2. *The Equal Footing Doctrine*

Nevada contends that "[t]he Equal-Footing Doctrine protects an unconsenting state's governmental prerogative to refuse to provide a solution to the nuclear utilities disposal problems created by non-preempted legislative decisions of other states. . . . The Nevada legislature's refusal to accept *all* high-level radioactive waste is an exercise of the police power guaranteed to the states by the Equal-Footing Doctrine which has not and may not be preempted in a comparative sense or an absolute sense." Petitioners' Opening Brief at 29 (emphasis in original) (footnote omitted).

The equal footing doctrine ensures that each state shares "those attributes essential to its equality in dignity and power with other states." *Coyle v. Oklahoma*, 221 U.S. 559, 568 (1911). The Supreme Court's broadest exposition of the equal footing doctrine is found in *United States v. Texas*, 339 U.S. 707 (1950):

> The "equal footing clause" has long been held to refer to political rights and to sovereignty. It does not, of course, include economic stature or standing. There has never been equality among the States in that sense. Some States when they entered the Union had within their boundaries tracts of land belonging to the Federal Government; others were sovereigns of their soil. Some had special agreements with the Federal Government governing property within their borders. Area, location, geology, and latitude have created great diversity in the economic aspects of the several States. The requirement of equal footing was designed not to wipe out those diversities but to create parity as respects political standing and sovereignty.

Id. at 716. Thus, "[t]he Federal Government . . . cannot dispose of a right possessed by the State under the equal-footing doctrine of the United States Constitution." *Summa Corp. v. California*, 466 U.S. 198, 205 (1984). The doctrine has been primarily applied to ensure that each State takes title to the beds of all navigable waters in that State, as did the original thirteen States that formed the Union. *See, e.g., Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476 (1988) ("[T]he States, upon entry into the Union, received ownership of all lands under waters subject to the ebb and flow of the tide."); *accord Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 228-29 (1845).

[3] The equal footing doctrine, however, "negatives any implied, special limitation of any of the paramount powers of

the United States in favor of a State." *United States v. Texas*, 339 U.S. at 717. The States may only "exert that residuum of sovereignty not delegated to the United States by the Constitution itself." *Coyle v. Oklahoma*, 221 U.S. at 567. Thus, for example, the title to lands underlying navigable waters may pass to the States "as incident to the transfer to the State of local sovereignty," but that title is still "subject . . . to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce." *United States v. Oregon*, 295 U.S. 1, 14 (1935). Thus, the equal footing doctrine is not a restriction on Congress' power to enact regulations concerning the siting of a national nuclear waste repository pursuant to the Property Clause. That power is delegated to Congress by the Constitution.

3. *The Privileges and Immunities Clause*

Nevada contends that the Article IV Privileges and Immunities Clause "protect[s] the privileges and immunities of states as political communities of citizens." Petitioners' Opening Brief at 33. Nevada argues that permitting "forty-nine of the republic's members, acting under the pretext of the Supremacy Clause, to destroy the economy or environment of its politically weakest member" would "deprive a state and the citizens of such state of the privileges and immunities of national citizenship and membership." Petitioners' Opening Brief at 34.

[4] The Privileges and Immunities Clause provides that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1. The clause was intended " 'to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned.' " *Supreme Court v. Friedman*, 487 U.S. 59, 64 (1988) (quoting *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869)). The clause " 'was designed to insure to a citizen of State A who ventures into State B the

same privileges which the citizens of State B enjoy.' " *Id.* (quoting *Toomer v. Witsell,* 334 U.S. 385, 395 (1948) (footnote omitted)); *see also Hague v. Committee for Indus. Org.,* 307 U.S. 496, 511 (1939) (The clause prevents "a State from discriminating against citizens of other States in favor of its own." (footnote omitted)). Thus, the Privileges and Immunities Clause has been construed as a limitation on the powers of the States, not on the powers of the federal government. *Hawes v. Club Ecuestre El Commandante,* 535 F.2d 140, 145 (1st Cir. 1976); *accord Maynard v United States Dist. Court,* 701 F. Supp. 738, 740 (C.D. Cal. 1988); *see generally* Note, *Membership Has Its Privileges and Immunities,* 102 Harv. L. Rev. 1925 (1989) (arguing that the Article IV Privileges and Immunities clause should be a source of congressional power to protect rights of national citizenship against private interference). Nevada's construction of the Privileges and Immunities Clause is erroneous.

4. *The Tenth Amendment*

Nevada maintains that its rights under the tenth amendment were violated by the manner in which the 1987 NWPA amendments were enacted. Nevada asserts that "[i]t is undoubtedly a defect of the variety contemplated by the U.S. Supreme Court when powerful Senators and Congressmen get together in closed rooms without representation of the state affected and determine[ ] that a single-named state must accept a federal program shunned by all." Petitioners' Opening Brief at 43. Nevada argues that because Nevada was not represented on the House and Senate Conference Committee on the Omnibus Budget Reconciliation Act of 1987 when the 1987 NWPA amendments were approved, it was deprived of its " 'right to participate in the national political process' " and " 'was singled out in a way that left it politically isolated and powerless.' " Petitioners' Opening Brief at 40 (quoting *South Carolina v. Baker,* 485 U.S. 505, 512 (1988)).

In making this argument, Nevada must confront the strictures of *South Carolina v. Baker,* 485 U.S. 505 (1988), and

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985). As the Supreme Court pointed out in *South Carolina v. Baker*, "*Garcia* holds that the [tenth amendment limits on Congress' authority to regulate state activities] are structural, not substantive — i.e., that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity." 485 U.S. at 512; *see also Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. at 552 ("State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.").

In *Baker*, the Court noted that "*Garcia* left open the possibility that some extraordinary defects in the national political process might render congressional regulation of state activities invalid under the Tenth Amendment" but that the *Garcia* case did not "identify or define the defects that might lead to such invalidation." *South Carolina v. Baker*, 485 U.S. at 512. The Court also declined to do so in *Baker*, although it intimated that a state might be required to show that "it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless." *Id.* at 513; *see also Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. at 554 ("[T]he fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a 'sacred province of state autonomy.' " (quoting *EEOC v. Wyoming*, 460 U.S. 226, 236 (1983))). Whether such a showing is possible is unclear; commentators have read *Baker* as "unequivocally repudiating the suggestion that the tenth amendment requires any substantive or qualitative analysis

of the national political process." *The Supreme Court, 1987 Term — Leading Cases,* 102 Harv. L. Rev. 143, 228 (1988).

[5] Nevada cannot point to any defect in the political process that led to the enactment of the 1987 NWPA amendments. As the Secretary points out, the tenth amendment does not protect a State from being outvoted in Congress. Nevada's relative lack of political strength is a result of the "Great Compromise" of the 1787 Constitutional Convention, in which each State was guaranteed equal representation in the Senate and proportionate representation in the House of Representatives. *Wesberry v. Sanders,* 376 U.S. 1, 9-14 (1964) (citing 3 *The Records of the Federal Convention of 1787* 14 (M. Farrand ed. 1911)); *see also Bode v. National Democratic Party,* 452 F.2d 1302, 1307-08 (D.C. Cir. 1971) ("The compromise met the objections of the less populous states to a distribution of national political power solely on a population basis notwithstanding the federated character of the new nation, formed of sovereign States."), *cert. denied,* 404 U.S. 1019 (1972).

Nor can Nevada complain that its lack of representation on the Conference Committee created a defect in the political process. The membership of the Conference Committee was established pursuant to Article I, section 5, clause 2, which, in pertinent part, states that "Each House may determine the Rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2; *see Vander Jagt v. O'Neill,* 699 F.2d 1166, 1172 (D.C. Cir.) (committee membership is a power allocated to each House of Congress pursuant to Art. I, § 5, cl. 2), *cert. denied,* 464 U.S. 823 (1983). To the extent that Nevada contends it should have had a representative on the committee, that issue is not justiciable. *Cf. Davids v. Akers,* 549 F.2d 120, 123-25 (9th Cir. 1977) (membership on state legislative committees is not a justiciable controversy). To the extent that Nevada asserts that lack of representation created a defect in the political process as contemplated by *South Carolina v. Baker,* it cannot succeed in light of the plenary consideration given to the

Omnibus Budget Reconciliation Act of 1987. *Cf. EEOC v. Vermont,* 904 F.2d 794, 802 (2d Cir. 1990) ("In any event, the absence of a given legislator or legislators, so long as the legislative body's appropriate procedural rules have been followed, does not mean that the national process leading to the enactment of a given piece of legislation was flawed.").

Nevada's other arguments on this issue have little merit. Nevada does not explain why the fact that the 1987 NWPA amendments were part of an appropriations bill is objectionable. When Congress desires to modify an existing statute, " '[t]here can be no doubt that . . . it could accomplish its purpose by an amendment to an appropriation bill, or otherwise.' " *United States v. Will,* 449 U.S. 200, 222 (1980) (quoting *United States v. Dickerson,* 310 U.S. 554, 555 (1940)). Furthermore, Nevada's argument that the 1987 amendments were enacted in violation of the Bicameralism and Presentment Clause, U.S. Const. art. I, § 7, cl. 1, is unpersuasive in view of the fact that it does not dispute the Secretary's contention that the Omnibus Budget Reconciliation Act of 1987 was passed in accordance with those provisions. Finally, we find it difficult to accept Nevada's argument that the enactment of the 1987 NWPA amendments constituted a failure in the political process in light of the fact that the NWPA contains a mechanism for Nevada to register its disapproval of a repository siting decision. *See* 42 U.S.C. § 10136(b). Thus, the tenth amendment does not limit Congress' authority to enact the 1987 NWPA amendments.

5. *The Port Preference Clause*

Nevada contends that Congress' enactment of the 1987 NWPA amendments violated the Port Preference Clause of Article I. Nevada asserts that "[i]n effect, the NWPA has created a preference for world-wide tourists in states other than Nevada because Nevada will be saddled with a nuclear waste induced stigma if the repository program reaches fruition through the site characterization program. That stigma may

dissuade tourists from selecting Las Vegas and cause them to prefer other destinations over Las Vegas." Petitioners' Opening Brief at 47.

[6] The Port Preference Clause provides that "No preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another." U.S. Const. art. I, § 9, cl. 6. The clause " 'prevent[s] preference as between States in respect of their ports or the entry and clearance of vessels.' " *Alabama Great S. R.R. Co. v. United States*, 340 U.S. 216, 229 (1951) (quoting *Louisiana Public Serv. Comm'n v. Texas & N.O. R.R. Co.*, 284 U.S. 125, 131 (1931)). As the Secretary points out, although the Port Preference Clause is a positive limitation on congressional authority, the clause does not prohibit legislation that "incidentally result[s] to the disadvantage of other ports in the same or neighboring States." *Id.* (quoting *Louisiana Public Serv. Comm'n v. Texas & N.O. R.R. Co.*, 284 U.S. at 131); *see also South Carolina v. Georgia*, 93 U.S. (3 Otto) 4, 13 (1876) ("[T]he prohibition of such a preference does not extend to acts which may directly benefit the ports of one state and only incidentally injuriously affect those of another . . . ."); *accord Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 433-35 (1856). Thus, legislative enactments do not offend the Port Preference Clause "even if they result in some detriment to the port of a state, where they occur . . . as an incident to some otherwise legitimate government act regulating commerce." *City of Houston v. FAA*, 679 F.2d 1184, 1197 (5th Cir. 1982). Assuming, arguendo, that site characterization of Yucca Mountain will be detrimental to Nevada's tourist industry, such an effect is merely an incident to a valid congressional enactment.

We conclude that Congress' authority to enact the 1987 NWPA amendments pursuant to the Property Clause is not limited by any other provision of the Constitution.

II. *The Effectiveness of Nevada's Notice of Disapproval*

Nevada contends that the submission of Assembly Joint Resolutions 4 and 6 constituted a valid notice of disapproval that took effect because Congress failed to enact a joint resolution overriding the notice within 90 days, pursuant to 42 U.S.C. § 10135(c). Nevada argues that the Secretary's pursuit of site characterization in the face of the notice of disapproval is arbitrary and capricious. Nevada first contends that the timing provisions of the NWPA that govern the submission of a notice of disapproval are unconstitutional. Secondly, it is asserted that Nevada may submit a notice of disapproval *prior* to the President's recommendation of a repository to Congress, pursuant to 42 U.S.C. § 10134(2)(A). Neither contention has merit.

A. *The Guarantee Clause*

Nevada contends that the provisions of the NWPA that govern the timing of the State's submission of a notice of disapproval violate the Guarantee Clause, U.S. Const. art. IV, § 4. Section 10136(b) provides that

> Unless otherwise provided by State law, the Governor or legislature of each State shall have authority to submit a notice of disapproval to the Congress under paragraph (2). In any case in which State law provides for submission of any such notice of disapproval by any other person or entity, any reference in this part to the Governor or legislature of such State shall be considered to refer to such other person or entity.

42 U.S.C. § 10136(b)(1) (1982). Paragraph (2) permits "[s]uch Governor or legislature [to] submit such a notice of disapproval to the Congress not later than the 60 days after the date that the President recommends such site to the Congress under section 10134 of this title." *Id.* § 10136(b)(2).

The Nevada legislature meets on a biennial basis for approximately five to six months. Nev. Const. art. 4, § 2. Because of this schedule, Nevada asserts that the Secretary and the President may time the recommendation of Yucca Mountain as the repository site at a time when the legislature is not in session. The Governor may then refuse to call a special session of the legislature, pursuant to Nev. Const., art. 5, § 9, and then decline to submit a notice of disapproval. By doing so, the Secretary and the President will deprive the citizens of Nevada of the "Republican Form of Government" guaranteed by Article IV, section 4 of the Constitution "because their representatives in the Legislature may be deprived of the opportunity to vote on the measure at the Governor's option." Petitioners' Opening Brief at 51.

[7] As the Secretary notes, this claim is wholly speculative. The President has not yet recommended Yucca Mountain to Congress for selection as the nuclear waste repository. Furthermore, challenges to legislation based on the Guarantee Clause are not justiciable. *City of Rome v. United States,* 446 U.S. 156, 182 n. 17 (1980); *Baker v. Carr,* 369 U.S. 186, 228-29 (1962).

B. *Compliance with Section 10136*

Nevada argues that the 1987 NWPA amendments designated Yucca Mountain as the repository site and, "therefore, there was a repeal by implication of any necessity to await a *pro forma* recommendation by the President. At that time, jeopardy immediately attached to Yucca Mountain and the question of the State's approval or disapproval was ripe." Petitioners' Opening Brief at 54 n.22.

"[R]epeals by implication are not favored, and will not be found unless an intent to repeal is 'clear and manifest.' " *Rodriguez v. United States,* 480 U.S. 522, 524 (1987) (per curiam). (citations omitted). An intent to repeal can only be inferred from the existence of an "irreconcilable conflict"

between an amendment and a statutory provision. *Id.* There is no such "irreconcilable conflict" between the 1987 NWPA amendments and section 10136(b)'s requirement that the President recommend the site for selection prior to Nevada's submission of a notice of disapproval. Instead, the provisions "fit together quite sensibly." *Id.*

[8] Section 10136(b) specifically ties the timing of a state notice of disapproval to the President's recommendation to Congress. *See* 42 U.S.C. § 10136(b)(2) ("Upon submission by the President to the Congress of a recommendation of a site for a repository, the Governor or legislature of the State in which such site is located may disapprove the site designation and submit to the Congress a notice of disapproval."). The President's recommendation to Congress is governed by section 10134. Pursuant to section 10134(a)(3), "[t]he President may not recommend the approval of the Yucca Mountain site unless the Secretary has recommended to the President under paragraph (1) approval of such site and has submitted to the President a statement from such site as required under such paragraph." *Id.* § 10134(a)(3)(A) (Supp. V 1987).

Paragraph (1) of section 10134 requires the Secretary to "hold public hearings in the vicinity of the Yucca Mountain site, for the purposes of informing the residents of the area of such consideration and receiving their comments regarding the possible recommendation of such site." *Id.* § 10134(a)(1). If, upon completion of the hearings and completion of the site characterization activities at the Yucca Mountain site pursuant to 42 U.S.C. § 10133, the Secretary decides to recommend approval of the site to the President, the Secretary must notify the Governor and legislature of Nevada. *Id.* Section 10134 also requires the preparation of an environmental impact statement to accompany the Secretary's recommendation to the President. *Id.* § 10134(f).

[9] An extensive amount of study, deliberation, and debate must take place before the President can make a recommen-

dation to Congress regarding his site selection. The fact that Congress amended the NWPA to make Yucca Mountain the only site to be characterized does not nullify the steps preceding the President's recommendation. Thus, the provisions do not "irreconciliably conflict," and there has been no implied repeal of recommendation as a prerequisite to Nevada's notice of disapproval. Because Nevada did not comply with section 10136(b), its notice of disapproval is ineffective under the plain language of the NWPA.

In its reply brief, Nevada raises for the first time the argument that 42 U.S.C. § 10247(c)(2)(B) constitutes a selection of Yucca Mountain as the repository site. Petitioners' Reply Brief at 2, 33. Section 10247(c)(2)(B) was enacted by Congress as part of the Omnibus Budget Reconciliation Act of 1987. As a result, Nevada had the opportunity to raise this issue in its opening brief. Consideration of this argument would be unfair to the Secretary, who has not had the advantage of briefing the issue. In declining to consider this argument, we follow " '[t]he general rule ... that appellants cannot raise a new issue for the first time in their reply briefs.' " *United States v. Birtle*, 792 F.2d 846, 848 (9th Cir. 1986) (quoting *Thompson v. Commissioner*, 631 F.2d 642, 649 (9th Cir. 1980), *cert. denied*, 452 U.S. 961 (1981)).

C. *Nevada's Attempted Legislative Veto of Site Characterization*

Section 459.910 of the Nevada Revised Statutes provides that "[i]t is unlawful for any person or governmental entity to store high-level radioactive waste in Nevada." Nev. Rev. Stat. § 459.910(1) (1989). "High-level radioactive waste" is defined by reference to 10 C.F.R. § 60.2. *Id.* § 459.910(2); *see* 10 C.F.R. § 60.2 (1990) (defining "high-level radioactive waste" as "(1) Irradiated reactor fuel, (2) liquid wastes resulting from the operation of the first cycle solvent extraction system, or equivalent, and the concentrated wastes from subsequent extracting cycles, or equivalent, in a facility for

reprocessing irradiated reactor fuel, and (3) solids into which such liquid wastes have been converted."). Nevada contends that section 459.910 and Assembly Joint Resolutions 4 and 6 are the substantial equivalent of a legislative veto of the Secretary's site characterization activities. Accordingly, it is argued, the Secretary's decision to continue site characterization in the face of Nevada's legislative veto is arbitrary and capricious. The Secretary maintains that the NWPA preempts section 459.910 to the extent that it is inconsistent with the Act.

Neither party contends that Congress has expressly preempted the field of nuclear waste disposal. Under the Supreme Court's preemption analysis, when Congress does not "define explicitly the extent to which its enactments preempt state law," *English v. General Elec. Co.*, 110 S. Ct. at 2275,

> "[S]tate law can be pre-empted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. . . . If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law . . . or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress."

California Coastal Comm'n v. Granite Rock Co., 480 U.S. at 581 (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 247 (1984)).

Whether Nevada's legislative veto is preempted under the first criterion is unclear. In its decisions considering the preemptive effect of the Atomic Energy Act, 42 U.S.C. §§ 2011-2284 (1982 & Supp. V 1987), the Supreme Court has con-

cluded that " the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States.' " *English v. General Elec. Co.*, 110 S. Ct. at 2277 (quoting *Pacific Gas & Elec. Co. v. State Energy Resources & Dev. Comm'n*, 461 U.S. 190, 212 & n.25 (1983)) (state-law tort claim for intentional infliction of emotional distress was not preempted by federal law); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 258 (1989) (state-law tort claim for punitive damages was not preempted by federal law); *Pacific Gas & Elec. Co. v. State Energy Resources & Dev. Comm'n*, 461 U.S. 190, 216 (1983) (California statute that conditioned the construction of a nuclear power plant on a state agency's approval of the plant's nuclear waste storage and disposal facilities was not preempted by federal law because it was motivated by economic concerns). The Court has not yet confronted the issue whether the NWPA "occupies the field" of nuclear waste disposal.

[10] At this juncture, it is not necessary for us to resolve this issue. Nevada's attempted legislative veto of the Secretary's site characterization activities " 'stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.' " *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. at 581 (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. at 248). Congress clearly directed the Secretary to continue site characterization activities at Yucca Mountain in the 1987 amendments to the NWPA. *See* 42 U.S.C. § 10133(a) (Supp. V 1987) ("The Secretary shall carry out, in accordance with the provisions of this section, appropriate site characterization activities at the Yucca Mountain site."). "[A]ny state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause." *Perez v. Campbell*, 402 U.S. 637, 652 (1971). We hold that Nevada's attempted legislative veto of the Secretary's site characterization activities is preempted by the NWPA.

Nevada argues that, because its legislative veto is premised on economic and environmental concerns, its action falls

within the police powers reserved to the states and is not pre-empted. Nevada relies on *Pacific Gas & Electric Co. v. State Energy Resources & Development Commission*, 461 U.S. 190 (1983), to support this argument. In that case, the Court concluded that the state law being challenged was not preempted by the federal laws regulating nuclear safety because it was motivated by economic concerns. *Id.* at 216. More recently, however, the Supreme Court has clarified *Pacific Gas & Electric*, noting that although "part of the pre-empted field is defined by reference to the purpose of the state law in question, . . . another part of the field is defined by the state law's actual effect on nuclear safety." *English v. General Elec. Co.*, 110 S. Ct. at 2278.

"[F]ield pre-emption may be understood as a species of conflict pre-emption." *Id.* at 2275. Although the professed motivation for Nevada's legislative veto is the economic and environmental effects of nuclear waste disposal, the state's action has the actual effect of frustrating Congress' intent. Thus, the attempted legislative veto is preempted by the 1987 NWPA amendments.

III. *The Secretary's Site Disqualification Process*

Nevada contends that the Secretary "must have a methodology, some formalized system of data collection, evaluation and decision making, to determine, *early and throughout* the process, whether or not *any* Disqualifying Conditions exist, and if so, for making the required decision to terminate work at the site *whenever* such a condition is found." Petitioners' Opening Brief at 67 (emphasis in original). Nevada further asserts that sufficient information now exists that compels the conclusion that Yucca Mountain is unsuitable for development as a repository and, therefore, must be disqualified as a potential site. Petitioners' Opening Brief at 72. The Secretary argues that his site characterization methodology is not subject to judicial review under the provisions of either the NWPA or the Administrative Procedure Act.

The NWPA provides for judicial review of "the failure of the Secretary ... [to] take any action, required under [the NWPA]." 42 U.S.C. § 10139(a)(1)(B). An examination of the NWPA and the regulations governing site disqualification leads to the conclusion that promulgation of regulations governing the timing of a site disqualification decision is not required under the NWPA.

Pursuant to section 10133, the Secretary has the authority to carry out "appropriate site characterization activities at the Yucca Mountain site." *Id.* § 10133(a). Section 10133 also requires the Secretary to establish criteria to be used to determine the suitability of Yucca Mountain for the location of a repository:

> (1) Before proceeding to sink shafts at the Yucca Mountain site, the Secretary shall submit for such candidate site to the Commission and to the Governor or legislature of the State of Nevada, for their review and comment —
>
> (A) a general plan for site characterization activities to be conducted at such candidate site, which plan shall include —
>
> ....
>
> (iv) criteria to be used to determine the suitability of such candidate site for the location of a repository, developed pursuant to section 10132(a) of this title ....

Id. § 10133(b)(1) (1982 & Supp. V 1987). Section 10132(a) sets forth the Secretary's duty to issue guidelines for the recommendation of sites for repositories. After the NWPA was amended in 1987, section 10132(a) was retained unchanged. *See id.* § 10132(a) (Supp. V 1987). As amended section 10133(b), quoted above, makes clear, the guidelines devel-

oped by the Secretary pursuant to section 10132(a) are to be utilized to determine the suitability of Yucca Mountain for the location of the repository. *Id.* § 10133(b)(1)(A)(iv). Section 10132(a) provides, in pertinent part, that

> Such guidelines shall specify detailed geologic considerations that shall be primary criteria for the selection of sites in various geologic media. Such guidelines shall specify factors that qualify or disqualify any site from development as a repository, including factors pertaining to the location of valuable natural resources, hydrology, geophysics, seismic activity, and atomic energy defense activities, proximity to water supplies, proximity to populations, the effect upon the rights of users of water, and proximity to components of the National Park System, the National Wildlife Refuge System, the National Wild and Scenic Rivers System, the National Wilderness Preservation System, or National Forest Lands. Such guidelines shall take into consideration the proximity to sites where high-level radioactive waste and spent nuclear fuel is generated or temporarily stored and the transportation and safety factors involved in moving such waste to a repository. Such guidelines shall specify population factors that will disqualify any site from development as a repository if any surface facility of such repository would be located (1) in a highly populated area; or (2) adjacent to an area 1 mile by 1 mile having a population of not less than 1,000 individuals. Such guidelines also shall require the Secretary to consider the cost and impact of transporting to the repository site the solidified high-level radioactive waste and spent fuel to be disposed of in the repository and the advantages of regional distribution in the siting of repositories. Such guidelines shall require the Secretary to consider the various geologic media in which sites for repositories may be

> located and, to the extent practicable, to recommend sites in different geologic media.

Id. § 10132(a) (1982). These guidelines are set forth at 10 C.F.R. §§ 960.3, 960.4 (1989).

Section 10133 sets forth the parameters of the Secretary's authority to carry out side characterization activities:

> (1) The Secretary may conduct at the Yucca Mountain site only such site characterization activities as the Secretary considers necessary to provide the data required for evaluation of the suitability of such site for an application to be submitted to the Commission for a construction authorization for a repository at such site, and for compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).
>
> (2) In conducting site characterization activities —
>
> (A) the Secretary may not use any radioactive material at a site unless the commission concurs that such use is necessary to provide data for the preparation of the required environmental reports and an application for a construction authorization for a repository at such site; and
>
> (B) if any radioactive material is used at a site —
>
> (i) the Secretary shall use the minimum quantity necessary to determine the suitability of such site for a repository, but in no event more than the curie equivalent of 10 metric tons of spent nuclear fuel; and
>
> (ii) such radioactive material shall be fully retrievable.

42 U.S.C. § 10133(b).

Nevada does not contend that the Secretary has failed to establish guidelines pursuant to section 10132(a). Instead, Nevada contends that the Secretary has a judicially enforceable duty to determine, throughout the site characterization process, whether any disqualifying conditions exist. The statutory scheme, however, does not create any right to judicial review of the Secretary's timing of site disqualification. To the contrary, the statute appears to commit the timing of the Secretary's decision regarding disqualifying conditions to his discretion. Section 10133(c) provides:

> (3) *If the Secretary at any time determines* the Yucca Mountain site to be unsuitable for development as a repository, the Secretary shall —
>
> (A) terminate all site characterization activities at such site;
>
> (B) notify the Congress, the Governor and legislature of Nevada of such termination and the reasons for such termination;
>
> (C) remove any high-level radioactive waste, spent nuclear fuel, or other radioactive materials at or in such site as promptly as practicable;
>
> (D) take reasonable and necessary steps to reclaim the site and to mitigate any significant adverse environmental impacts caused by site characterization activities at such site;
>
> (E) suspend all future benefits payments under part F of this subchapter with respect to such site; and
>
> (F) report to Congress not later than 6 months after such determination the Secretary's recommen-

> dations for further action to assure the safe, permanent disposal of spent nuclear fuel and high-level radioactive waste, including the need for new legislative authority.

Id. § 10133(c) (emphasis added). Such a determination is considered "a preliminary decisionmaking activity" pursuant to section 10133(d).

The Department of Energy's regulations regarding site disqualification also protect the discretion granted to the Secretary in determining the timing of a site disqualification. 10 C.F.R. § 960.3-1-5 provides, in pertinent part, that "[a] site shall be disqualified at any time during the siting process if the evidence supports a finding by the DOE that a disqualifying condition exists or the qualifying condition of any system or technical guideline cannot be met." 10 C.F.R. § 960.3-1-5 (1989). The Secretary, of course, must make the evaluation that a disqualifying condition exists. Thus, this regulation supports the Secretary's exercise of discretion in timing a disqualification decision.

[11] Because the Secretary is not required to promulgate regulations governing the timing of a disqualification decision, judicial review of his decision not to do so is not available under section 10139(a). If a statute does not expressly provide for judicial review of an agency decision, judicial review is available within the constraints of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-706 (1988). *Clementson v. Brock*, 806 F.2d 1402, 1407 (9th Cir. 1986). Under the APA, final agency action, including a failure to act, is subject to judicial review if there is no other adequate remedy in a court. 5 U.S.C. §§ 551(13), 704 (1988). "It is the imposition of an obligation or the fixing of a legal relationship that is the indicium of finality of the administrative process." *Getty Oil Co. v. Andrus*, 607 F.2d 253, 256 (9th Cir. 1979). Because site characterization does not create any legal obligation or relationship on the part of Nevada, it is doubtful

whether the Secretary's failure to provide for the timing of his disqualification decisions has the requisite finality.

[12] Even assuming this failure to act is a final agency action, judicial review under the APA is precluded to the extent that "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2) (1988). "Such action is unreviewable, for there is simply 'no law to apply.' " *Clementson v. Brock*, 806 F.2d at 1404 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)). Under section 701(a)(2), "even when Congress has not affirmatively precluded judicial oversight, 'review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.' " *Webster v. Doe*, 486 U.S. 592, 599-600 (1988) (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)). The timing of a disqualification decision is committed to the Secretary's discretion by law. As a result, Nevada cannot contend that an early suitability decision is required based on the available evidence. The Secretary simply has not determined whether disqualifying conditions exist, preferring instead to pursue further study. This decision is not reviewable.

CONCLUSION

The Secretary's decision to continue site characterization is not contrary to law. The Secretary has no judicially enforceable duty to promulgate regulations governing the timing of site disqualification decisions.

AFFIRMED.

CONSTITUTIONAL PROVISIONS

PROPERTY CLAUSE, Art. IV, § 3, cl. 2.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

FEDERAL ENCLAVE CLAUSE, Art. I, § 8, cl. 17.

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts,

Magazines, Arsenals, dock-Yards, and other needful Buildings;

BICAMERALISM AND PRESENTMENT CLAUSE, Art. I, § 7, cl. 2, cl. 3.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be

determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according

to the Rules and Limitations prescribed in the Case of a Bill.

GENERAL WELFARE CLAUSE, Art. I, § 8, cl. 1.

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

GUARANTEE CLAUSE, Art. IV, § 4.

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

SUPREMACY CLAUSE, Art. VI, Cl. 2.

This Constitution, and the Laws of the United States which shall be made in

Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

NUCLEAR WASTE POLICY ACT[1]

FINDINGS AND PURPOSE

SEC. 111, 42 USC 10131. FINDINGS. (a)The Congress finds that--

(1) radioactive waste creates potential risks and requires safe and environmentally acceptable methods of disposal;

(2) a national problem has been created by the accumulation of (A) spent nuclear fuel from nuclear reactors; and (B) radioactive waste from (i) reprocessing of spent nuclear fuel; (ii) activities related to medical research, diagnosis, and treatment; and (iii) other sources;

---

[1]The Nuclear Waste Policy Act, as Amended, is voluminous. Sections of the Act which are necessary for an understanding of the Petition For Writ Of Certiorari are reproduced in this Appendix. Some sections presented were either amended in 1987 or added to the Nuclear Waste Policy Act at that time. The amended language and new provisions are indicated by underlineation. Language of the 1982 Act which was deleted is represented by interlineations. As presented, the 1982 version of the United States Code is set forth if the amendments are disregarded. The 1982 version as amended by Supplement V, 1987 is set forth by the amendments.

(3) Federal efforts during the past 30 years to devise a permanent solution to the problems of civilian radioactive waste disposal have not been adequate;

(4) while the Federal Government has the responsibility to provide for the permanent disposal of high-level radioactive waste and such spent nuclear fuel as may be disposed of in order to protect the public health and safety and the environment, the costs of such disposal should be the responsibility of the generators and owners of such waste and spent fuel;

(5) the generators and owners of high-level radioactive waste and spent nuclear fuel have the primary responsibility to provide for, and the responsibility to pay the costs of, the interim storage of such waste and spent fuel until such waste and spent fuel is accepted by the Secretary of Energy in accordance with

the provisions of this Act;

(6) State and public participation in the planning and development of repositories is essential in order to promote public confidence in the safety of disposal of such waste and spent fuel; and

(7) high-level radioactive waste and spent nuclear fuel have become major subjects of public concern, and appropriate precautions must be taken to ensure that such waste and spent fuel do not adversely affect the public health and safety and the environment for this or future generations.

(b) PURPOSES. The purposes of this subtitle are--

(1) to establish a schedule for the siting, construction, and operation of repositories that will provide a reasonable assurance that the public and the environment will be adequately protected from the hazards posed by high-

level radioactive waste and such spent nuclear fuel as may be disposed of in a repository;

(2) to establish the Federal responsibility, and a definite Federal policy, for the disposal of such waste and spent fuel;

(3) to define the relationship between the Federal Government and the State governments with respect to the disposal of such waste and spent fuel; and

(4) to establish a Nuclear Waste Fund, composed of payments made by the generators and owners of such waste and spent fuel, that will ensure that the costs of carrying out activities relating to the disposal of such waste and spent fuel will be borne by the persons responsible for generating such waste and spent fuel.

RECOMMENDATION OF CANDIDATE SITES FOR SITE CHARACTERIZATION

SEC. 112, 42 USC 10132. (a)GUIDELINES. Not later than 180 days after the date of the enactment of this Act, the Secretary, following consultation with the Council on Environmental Quality, the Administrator of the Environmental Protection Agency, the Director of the Geological Survey, and interested Governors, and the concurrence of the Commission shall issue general guidelines for the recommendation of sites for repositories. Such guidelines shall specify detailed geologic considerations that shall be primary criteria for the selection of sites in various geologic media. Such guidelines shall specify factors that qualify or disqualify any site from development as a repository, including factors pertaining to the location of valuable natural resources, hydrology, geophysics, seismic activity, and atomic energy defense activities,

proximity to water supplies, proximity to components of the National Park System, the National Wildlife Refuge System, the National Wild and Scenic Rivers System, the National Wilderness Preservation System, or National Forest Lands. Such guidelines shall take into consideration the proximity to sites where high-level radioactive waste and spent nuclear fuel is generated or temporarily stored and the transportation and safety factors involved in moving such waste to a repository. Such guidelines shall specify population factors that will disqualify any site from development as a repository if any surface facility of such repository would be located (1) in a highly populated area; or (2) adjacent to an area 1 mile by 1 mile having a population of not less than 1,000 individuals. Such guidelines also shall require the Secretary to consider the

cost and impact of transporting to the repository site the solidified high-level radioactive waste an spent fuel to be disposed of in the repository and the advantages of regional distribution in the siting of repositories. Such guidelines shall require the Secretary to consider the various geologic media in which sites for repositories may be located and, to the extent practicable, to recommend sites in different geologic media. The Secretary shall use guidelines established under this subsection in considering candidate sites for recommendation under subsection (b). The Secretary may revise such guidelines from time to time, consistent with the provisions of this subsection.

(b) RECOMMENDATION BY SECRETARY TO THE PRESIDENT. (1)(A) Following the issuance of guidelines under subsection (a) and consultation with the Governors of

affected States, the Secretary shall nominate at least 5 sites that he determines suitable for site characterization for selection of the first repository site.

(B) Subsequent to such nomination the Secretary shall recommend to the President 3 of the nominated sites not later than January 1, 1985 for characterization as candidate sites.

~~(C) Not later than July 1, 1989, the Secretary shall nominate 5 sites, which shall include at least 3 additional sites not nominated under subparagraph (A), and recommend by such date to the President from such 5 nominated site 3 candidate sites the Secretary determines suitable for site characterization for selection of the second repository. The Secretary may not nominate any site previously nominated under subparagraph (A), that was not recommended as a candidate site~~

~~under subparagraph (B).~~

~~(D)~~ (C) Such recommendations under subparagraph~~s~~ (B) ~~and (C)~~ shall be consistent with the provisions of section 10225 of this title.

~~(E)~~ (D) Each nomination of a site under this subsection shall be accompanied by an environmental assessment, which shall include a detailed statement of the basis for such recommendation and of the probable impacts of the site characterization activities planned for such site, and a discussion of alternative activities relating to site characterization that may be undertaken to avoid such impacts. Such environmental assessment shall include--

(i) an evaluation by the Secretary as to whether such site is suitable for site characterization under the guidelines established under subsection (a);

(ii) an evaluation by the Secretary as to whether such site is suitable for development as a repository under each such guideline that does not require site characterization as a prerequisite for application of such guideline;

(iii) an evaluation by the Secretary of the effects of the site characterization activities at such site on the public health and safety and the environment;

(iv) a reasonable comparative evaluation by the Secretary of such site with other sites and locations that have been considered;

(v) a description of the decision process by which such site was recommended; and

(vi) an assessment of the regional and local impacts of locating the proposed repository at such site.

~~(F)~~(E)(i) The issuance of any environmental assessment under this paragraph shall be considered to be a final agency action subject to judicial review in accordance with the provisions of chapter 7 of title 5, United States Code, and section 10139. Such judicial review shall be limited to the sufficiency of such environmental assessment with respect to the items described in clauses (i) through (vi) of subparagraph ~~(E)~~(D).

(F)~~(G)~~ Each environmental assessment prepared under this paragraph shall be made available to the public.

(G)~~(H)~~ Before nominating a site, the Secretary shall notify the Governor and legislature of the State in which such site is located, or the governing body of the affected Indian tribe where such site is located, as the case may be, of such nomination and the basis for such

nomination.

(2) Before nominating any site the Secretary shall hold public hearings in the vicinity of such site to inform the residents of the area in which such site is located of the proposed nomination of such site and to receive their comments. At such hearings, the Secretary shall also solicit and receive any recommendations of such residents with respect to issues that should be addressed in the environmental assessment described in paragraph (1) and the site characterization plan described in section 10133(b)(1).

(3) In evaluating the sites nominated under this section prior to any decision to recommend a site as a candidate site, the Secretary shall use available geophysical, geologic, geochemical and hydrologic, and other information and shall not conduct any preliminary borings

or excavations at a site unless (i) such preliminary boring or excavation activities were in progress on January 7, 1983 or (ii) the Secretary certifies that such available information from other sources, in the absence of preliminary borings or excavations, will not be adequate to satisfy applicable requirements of this Act or any other law: Provided, That preliminary borings or excavations under this section shall not exceed a diameter of 6 inches.

(c) PRESIDENTIAL REVIEW OF RECOMMENDED CANDIDATE SITES. (1) The President shall review each candidate site recommendation made by the Secretary under subsection (b). Not later than 60 days after the submission by the Secretary of a recommendation of a candidate site, the President, in his discretion, may either approve or disapprove such candidate site, and shall transmit any such

decision to the Secretary and to either the Governor and legislature of the State in which such candidate site is located, or the governing body of the affected Indian tribe where such candidate site is located, as the case may be. If, during such 60-day period, the President fails to approve or disapprove such candidate site, or fails to invoke his authority under paragraph (2) to delay his decision, such candidate site shall be considered to be approved, and the Secretary shall notify such Governor and legislature, or governing body of the affected Indian tribe, of the approval of such candidate site by reason of the inaction of the President.

(2) The President may delay for not more than 6 months his decision under paragraph (1) to approve or disapprove a candidate site, upon determining that the information provided with the

recommendation of the Secretary is insufficient to permit a decision within the 60-day period referred to in paragraph (1). The President may invoke his authority under this paragraph by submitting written notice to the Congress, within such 60-day period, of his intent to invoke such authority. If the President invokes such authority, but fails to approve or disapprove the candidate site involved by the end of such 6-month period, such candidate site shall be considered to be approved, and the Secretary shall notify such Governor and legislature, or governing body of the affected Indian tribe, of the approval of such candidate site by reason of the inaction of the President.

~~(d) CONTINUATION OF CANDIDATE SITE SCREENING. After the required recommendation of candidate sites under subsection (b), the Secretary may~~

~~continue, as he determines necessary, to identify and study other sites to determine their suitability for recommendation for site characterization, in accordance with the procedures described in this section.~~

~~(e)~~(d) PRELIMINARY ACTIVITIES. Except as otherwise provided in this section, each activity of the President or the Secretary under this section shall be considered to be a preliminary decisionmaking activity. No such activity shall require the preparation of an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)), or to require any environmental review under subparagraph (E) or (F) of section 102(2) of such Act.

~~(f)~~(e) ~~TIMELY SITE CHARACTERIZATION.--~~ ~~Nothing in this section may be construed as prohibiting the Secretary from~~

~~continuing ongoing or presently planned site characterization at any site Department of Energy land for which the location of the principal borehole has been approved by the Secretary by August 1, 1982, except that (1) the environmental assessment described in subsection (b)(1) shall be prepared and made available to the public before proceeding to sink shafts at any such site; and (2) the Secretary shall not continue site characterization at any such site unless such site is among the candidate sites recommended by the Secretary under the first sentence of subsection (b) for site characterization and approved by the President under subsection (c) of this section; and (3) the Secretary shall conduct public hearings under 10133(b)(2) of this title and comply with requirements under section 10137 of this title within one~~

~~year of January 7, 1983.~~

SITE CHARACTERIZATION

SEC. 113, 42 USC 10133. (a) IN GENERAL. The Secretary shall carry out, in accordance with the provisions of this section, appropriate site characterization activities at the Yucca Mountain site. ~~beginning with the candidate sites that have been approved under section 10132 and are located in various geologic media.~~ The Secretary shall consider fully the comments received under subsection (b)(2) and section 10132(b)(2) and shall, to the maximum extent practicable and in consultation with the Governor of the State of Nevada ~~State involved or the governing body of the affected Indian tribe involved,~~ conduct site characterization activities in a manner that minimizes any significant adverse environmental impacts identified in such

comments or in the environmental assessment submitted under subsection (b)(1) of this section.

(b) COMMISSION AND STATES. (1) Before proceeding to sink shafts at the Yucca Mountain site ~~any candidate site~~, the Secretary shall submit for such candidate site to the Commission and to the Governor or legislature of the State of Nevada ~~either the Governor and legislature of the State in which such candidate site is located, or the governing body of the affected Indian tribe on whose reservation such candidate site is located, as the case may be~~, for their review and comment-(A) a general plan for site characterization activities to be conducted at such candidate site, which plan shall include--

(i) a description of such candidate site;

(ii) a description of such site

characterization activities, including the following: the extent of planned excavations, plans for any onsite testing with radioactive or nonradioactive material, plans for any investigation activities that may affect the capability of such candidate site to isolate high-level radioactive waste and spent nuclear fuel, and plans to control any adverse, safety-related impacts from such site characterization activities;

(iii) plans for the decontamination and decommissioning of such candidate site, and for the mitigation of any significant adverse environmental impacts caused by site characterization activities if it is determined unsuitable for application for a construction authorization for a repository;

(iv) criteria to be used to determine the suitability of such candidate site for the location of a repository, developed pursuant to section 10132(a) of this title; and

(v) any other information required by the Commission;

(B) a description of the possible form or packaging for the high-level radioactive waste and spent nuclear fuel to be emplaced in such repository, a description, to the extent practicable, of the relationship between such waste form or packaging and the geologic medium of such site, and a description of the activities being conducted by the Secretary with respect to such possible waste form or packaging or such relationship; and

(C) a conceptual repository design that takes into account likely site-specific requirements.

(2) Before proceeding to sink shafts at the Yucca Mountain site ~~at any candidate site,~~ the Secretary shall (A) make available to the public the site characterization plan described in paragraph (1); and (B) hold public hearings in the vicinity of such candidate site to inform the residents of the area in which such candidate site is located of such plan, and to receive their comments.

(3) During the conduct of site characterization activities at the Yucca Mountain site ~~a candidate site~~, the Secretary shall report not less than once every 6 months to the Commission and to ~~either~~ the Governor and legislature of the State of Nevada ~~the State in which such candidate site located, or the governing body of the affected Indian tribe where such candidate site is located, as the case may be,~~ on the

nature and extent of such activities and the information developed from such activities.

(c) RESTRICTIONS. (1) The Secretary may conduct at ~~any candidate site~~ the Yucca Mountain site only such site characterization activities as the Secretary considers necessary to provide the data required for evaluation of the suitability of such ~~candidate~~ site for an application to be submitted to the Commission for a construction authorization for a repository at such ~~candidate~~ site, and for compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(2) In conducting site characterization activities--

(A) the Secretary may not use any radioactive material at a candidate site unless the Commission concurs that such use is necessary to provide data for the

preparation of the required environmental reports and an application for a construction authorization for a repository at such ~~candidate~~ site; and

(B) if any radioactive material is used at a ~~candidate~~ site--

(i) the Secretary shall use the minimum quantity necessary to determine the suitability of such ~~candidate~~ site for a repository, but in no event more than the curie equivalent of 10 metric tons of spent nuclear fuel; and

(ii) such radioactive material shall be fully retrievable.

~~(3) If site characterization activities are terminated at a candidate site for any reason, the Secretary shall (A) notify the Congress, the Governors and legislatures of all States in which candidate sites are located, and the governing bodies of~~

~~all affected Indian tribes where candidate sites are located, of such termination and the reasons for such termination; and (B) remove any high-level radioactive waste, spent nuclear fuel, or other radioactive materials at or in such candidate site as promptly as practicable.~~

~~(4) If a site is determined to be unsuitable for application for a construction authorization for a repository, the Secretary shall take reasonable and necessary steps to reclaim the site and to mitigate any significant adverse environmental impacts caused by site characterization activities.~~

(3) If the Secretary at any time determines the Yucca Mountain site to be unsuitable for development as a repository, the Secretary shall--

(A) terminate all site characterization activities at such site;

(B) notify the Congress, the Governor and legislature of Nevada of such termination and the reasons for such termination;

(C) remove any high-level radioactive waste, spent nuclear fuel, or other radioactive materials at or in such site as promptly as practicable;

(D) take reasonable and necessary steps to reclaim the site and to mitigate any significant adverse environmental impacts caused by site characterization activities at such site;

(E) suspend all future benefits payments under subtitle F with respect to such site; and

(F) report to Congress not later than 6 months after such determination the Secretary's recommendations for further action to assure the safe, permanent disposal of spent nuclear fuel and high-level radioactive waste, including the need for new legislative authority.

(d) PRELIMINARY ACTIVITIES. Each activity of the Secretary under this section that is in compliance with the provisions of subsection (c) shall be considered a preliminary decisionmaking activity. No such activity shall require the preparation of an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C), or to require any environmental review under subparagraph (E) or (F) of section 102(2) of such Act.

SITE APPROVAL AND CONSTRUCTION AUTHORIZATION

SEC. 114, 42 USC 10134. (a)HEARINGS AND PRESIDENTIAL RECOMMENDATION. (1) The Secretary shall hold public hearings in the vicinity of <u>the Yucca Mountain site</u> ~~each site under consideration for recommendation to the President under this paragraph as a site for the~~

~~development of a repository~~, for the purposes of informing the residents of the area ~~in which such site is located~~ of such consideration and receiving their comments regarding the possible recommendation of such site. If, of upon completion of such hearings and completion of site characterization activities at the Yucca Mountain site ~~not less than 3 candidate sites for the first proposed repository, or from all of the characterized sites for the development of subsequent repositories~~, under section 10133 of this title, the Secretary decides to recommend approval of such site to the President, the Secretary shall notify the Governor and legislature of the State of Nevada ~~in which such site is located, or the governing body of the affected Indian tribe where such site is located, as the case may be~~, of such decision. No sooner than the expiration

of the 30-day period following such notification, the Secretary shall submit to the President a recommendation that the President approve such site for the development of a repository. Any such recommendation by the Secretary shall be based on the record of information developed by the Secretary under section 10133 of this title and this section, including the information described in subparagraph (A) through subparagraph (G). ~~In making site recommendations and approvals subsequent to the first site recommendation, the Secretary and the President, respectively, shall also consider the need for regional distribution of repositories and the need to minimize, to the extent practicable, the impacts and cost of transporting spent fuel and solidified high-level radioactive waste~~. Together with any recommendation of a site under this

paragraph, the Secretary shall make available to the public, and submit to the President, a comprehensive statement of the basis of such recommendation, including the following:

(A) a description of the proposed repository, including preliminary engineering specifications for the facility;

(B) a description of the waste form or packaging proposed for use at such repository, and an explanation of the relationship between such waste form or packaging and the geologic medium of such site;

(C) a discussion of data, obtained in site characterization activities, relating to the safety of such site;

(D) a final environmental impact statement prepared pursuant to subsection (f) and the National Environment Policy Act of 1969 (42 U.S.C. 4321 et seq.),

together with comments made concerning such environmental impact statement by the Secretary of the Interior, the Council on Environmental Quality, the Administrator, and the Commission, except that the Secretary shall not be required in any such environmental impact statement to consider the need for a repository, the alternatives to geological disposal, or alternative sites to the Yucca Mountain site; ~~and including an analysis of the consideration given by the Secretary to not less than 3 candidate sites for the first proposed repository or to all of the characterized sites for the development of subsequent repositories, with respect to which site characterization is completed under section 10133 of this title, together with comments made concerning such environmental impact statement by the Secretary of the Interior, the Council on~~

~~Environmental Quality, the Administrator, and the Commission, except that any such environmental impact statement concerning the first repository to be developed under this Act shall not be required to consider the need for a repository or the alternatives to geologic disposal;~~

(E) preliminary comments of the Commission concerning the extent to which the at-depth site characterization analysis and the waste form proposal for such site seem to be sufficient for inclusion in any application to be submitted by the Secretary for licensing of such site as a repository;

(F) the views and comments of the Governor and legislature of any State, or the governing body of any affected Indian tribe, as determined by the Secretary, together with the response of the Secretary to such views;

(G) such other information as the

Secretary considers appropriate; and

(H) any impact report submitted under section 10136(c)(2)(B) of this title by the State of Nevada. ~~the State in which such site is located, or under section 10138(b)(3)(B) of this title by the affected Indian tribe where such site is located, as the case may be.~~

(2)(A) If, after recommendation by the Secretary, the President considers the Yucca Mountain site qualified for application for a construction authorization for a repository, the President shall submit a recommendation of such site to Congress.

~~(2)(A) Not later than March 31, 1987, the President shall submit to the Congress a recommendation of one site form the three sites initially characterized that the President considers qualified for application for a construction authorization for a repository. Not~~

~~later than March 31, 1990, the President shall submit to the Congress a recommendation of a second site from any sites already characterized that the President considers qualified for a construction authorization for a second repository. The President shall submit with such recommendation a copy of the report for such site prepared by the Secretary under paragraph (1). After submission of the second such recommendation, the President may submit to the Congress recommendations for other sites, in accordance with the provisions of this part.~~

(B) The President shall submit with such recommendation a copy of the statement for such site prepared by the Secretary under paragraph (1).

~~(B) The President may extend the deadlines described in subparagraph (A)~~

~~by not more than 12 months if, before March 31, 1986, for the first site, and March 31, 1989, for the second site, (i) the President determines that such extension is necessary; and (ii) transmits to the Congress a report setting forth the reasons for such extension.~~

~~(3) If approval of any such site recommendation does not take effect as a result of a disapproval by the Governor or legislature of a State under section 10136 of this title or the governing body of an affected Indian tribe under section 10138 of this title, the President shall submit to the Congress, not later than 1 year after the disapproval of such recommendation, a recommendation of another site for the first or subsequent repository.~~

(3)(A) ~~(4)(A)~~ The President may not recommend the approval of the Yucca

Mountain site ~~any site under this subsection~~ unless the Secretary has recommended to the President under paragraph (1) approval of such site and has submitted to the President a statement ~~report~~ for such site as required under such paragraph.

(B) No recommendation of a site by the President under this subsection shall require the preparation of an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C), or to require any environmental review under subparagraph (E) or (F) of section 102(2) of such Act.

(b) SUBMISSION OF APPLICATION. If the President recommends to the Congress the Yucca Mountain site ~~a site for a repository~~ under subsection (a) of this section and the site designation is permitted to take effect under section

10135 of this title, the Secretary shall submit to the Commission an application for a construction authorization for a repository at such site not later than 90 days after the date on which the recommendation of the site designation is effective under such section and shall provide to the Governor and legislature of the State <u>of Nevada</u> ~~in which such site is located, or the governing body of the affected Indian tribe where such site is located, as the case may be,~~ a copy of such application.

(c) STATUS REPORT ON APPLICATION. Not later than 1 year after the date on which an application for a construction authorization is submitted under subsection (b), and annually thereafter until the date on which such authorization is granted, the Commission shall submit a report to the Congress describing the proceedings undertaken

through the date of such report with regard to such application, including a description of--

(1) any major unresolved safety issues, and the explanation of the Secretary with respect to design and operation plans for resolving such issues;

(2) any matters of contention regarding such application; and

(3) any Commission actions regarding the granting or denial of such authorization.

(d) COMMISSION ACTION. The Commission shall consider an application for a construction authorization for all or part of a repository in accordance with the laws applicable to such applications, except that the Commission shall issue a final decision approving or disapproving the issuance of a construction authorization not later ~~than~~ the expiration--

~~(1) January 1, 1989, for the first such~~

~~application, and January 1, 1992, for the second such application; or~~

~~(2) the expiration~~ of 3 years after the date of the submission of such application, except that the Commission may extend such deadline by not more than 12 months if, not less than 30 days before such deadline, the Commission complies with the reporting requirements established in subsection e(2) (e)(2), of this section. ~~whichever occurs later.~~ The Commission decision approving the first such application shall prohibit the emplacement in the first repository of a quantity of spent fuel containing in excess of 70,000 metric tons of heavy metal or a quantity of solidified high-level radioactive waste resulting from the reprocessing of such a quantity of spent fuel until such time as a second repository is in operation. In the event that a monitored retrievable storage

facility, approved pursuant to subtitle C of this Act, shall be located, or is planned to be located, within 50 miles of the first repository, then the Commission decision approving the first such application shall prohibit the emplacement of a quantity of spent fuel containing in excess of 70,000 metric tons of heavy metal or a quantity of solidified high-level radioactive waste resulting from the reprocessing of spent fuel in both the repository and monitored retrievable storage facility until such time as a second repository is in operation.

(e) PROJECT DECISION SCHEDULE. (1) The Secretary shall prepare and update, as appropriate, in cooperation with all affected Federal agencies, a project decision schedule that portrays the optimum way to attain the operation of the repository ~~involved,~~ within the time

period specified in this subtitle. Such schedule shall include a description of objectives and a sequence of deadlines for all Federal agencies required to taken action, including an identification of the activities in which a delay in the start, or completion, of such activities will cause a delay in beginning repository operation.

(2) Any Federal agency that determines that it cannot comply with any deadline in the project decision schedule, or fails to so comply, shall submit to the Secretary and to the Congress a written report explaining the reason for its failure or expected failure to meet such deadline, the reason why such agency could not reach an agreement with the Secretary, the estimated time for completion of the activity or activities involved, the associated effect on its other deadlines in the project decision

schedule, and any recommendations it may have or actions it intends to take regarding any improvements in its operation or organization, or changes to its statutory directives or authority, so that it will be able to mitigate the delay involved. The Secretary, within 30 days after receiving any such report, shall file with the Congress his response to such report, including the reasons why the Secretary could not amend the project decision schedule to accommodate the Federal agency involved.

(f) ENVIRONMENTAL IMPACT STATEMENT. Any recommendation made by the Secretary under this section shall be considered a major Federal action significantly affecting the quality of the human environment for purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.). A final environmental impact statement prepared

by the Secretary under such Act shall accompany any recommendation to the President to approve a site for a repository.

(2) With respect to the requirements imposed by the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), compliance with the procedures and requirements of this Act shall be deemed adequate consideration of the need for a repository, the time of the initial availability of a repository, and all alternatives to the isolation of high-level radioactive waste and spent nuclear fuel in a repository.

(3) For purposes of complying with the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 1321 et seq.) and this section, the Secretary need not ~~shall~~ consider ~~as~~ alternate sites to the Yucca Mountain site for the first repository to be

developed under this subtitle. ~~3 candidate site with respect to which (1) site characterization has been completed under section 113; and (2) the Secretary has made a preliminary determination, that such sites are suitable for development as repositories consistent with the guidelines promulgated under section 10132(a) of this title. The Secretary shall consider as alternative sites for subsequent repositories at least three of the remaining sites recommended by the Secretary by January 1, 1985, and by July 1, 1989, pursuant to section 10132(b) of this title and approved by the President for site characterization pursuant to section 10132(c) of this title for which (1) site characterization has been completed under section 10133 of this title; and (2) the Secretary has made a preliminary determination that such sites are~~

~~suitable for development as repositories consistent with the guidelines promulgated under section 10132(a) of this title.~~

(4) Any environmental impact statement prepared in connection with a repository proposed to be constructed by the Secretary under this part shall, to the extent practicable, be adopted by the Commission in connection with the issuance by the Commission of a construction authorization and license for such repository. To the extent such statement is adopted by the Commission, such adoption shall be deemed to also satisfy the responsibilities of the Commission under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and no further consideration shall be required, except that nothing in this subsection shall affect any independent responsibilities

of the Commission to protect the public health and safety under the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.).

(5) Nothing in this Chapter shall be construed to amend or otherwise detract from the licensing requirements of the Nuclear Regulatory Commission as established in title II of the Energy Reorganization Act of 1974 (42 U.S.C. 5841 et seq.).

(6) In any such statement prepared with respect to the ~~first~~ repository to be constructed under this part, ~~the need for a repository or nongeologic alternatives to the site of such repository shall not be considered.~~ the Nuclear Regulatory Commission need not consider the need for a repository, the time of initial availability of a repository, alternate sites to the Yucca Mountain site, or nongeologic alternatives to such site.

REVIEW OF REPOSITORY SITE SELECTION

SEC. 115, 42 U.S.C. 10135. (a)"Resolution of repository siting approval" defined. For purposes of this section, the term "resolution of repository siting approval" means a joint resolution of the Congress, the matter after the resolving clause of which is as follows: "That there hereby is approved the site at . . . for a repository, with respect to which a notice of disapproval was submitted by . . . on . . . ." The first blank space in such resolution shall be filled with the name of the geographic location of the proposed site of the repository to which such resolution pertains; the second blank space in such resolution shall be filled with the designation of the State Governor and legislature or Indian tribe governing body submitting the notice of disapproval to which such resolution pertains; and the last blank space in such resolution

shall be filled with the date of such submission.

(b) STATE OR INDIAN TRIBE PETITIONS. The designation of a site as suitable for application for a construction authorization for a repository shall be effective at the end of the 60-day period beginning on the date that the President recommends such site to the Congress under section 10134 of this title, unless the Governor and legislature of the State in which such site is located, or the governing body of an Indian tribe on whose reservation such site is located, as the case may be, has submitted to the Congress a notice of disapproval under section 10136 or 10138 of this title. If any such notice of disapproval has been submitted, the designation of such site shall not be effective except as provided under subsection (c) of this section.

(c) CONGRESSIONAL REVIEWS OF PETITIONS.

If any notice of disapproval of a repository site designation has been submitted to the Congress under section 10136 or 10138 of this title after a recommendation for approval of such site is made by the President under section 10134 of this title, such site shall be disapproved unless, during the first period of 90 calendar days of continuous session of the Congress after the date of the receipt by the Congress of such notice of disapproval, the Congress passes a resolution of repository siting approval in accordance with this subsection approving such site, and such resolution thereafter becomes law.

(d) PROCEDURES APPLICABLE TO THE SENATE.

(1) The provisions of this subsection are enacted by the Congress--

(A) as an exercise of the rulemaking power of the Senate, and as such they are deemed a part of the rules of the Senate,

but applicable only with respect to the procedure to be followed in the Senate in the case of resolutions of repository siting approval, and such provisions supersede other rules of the Senate only to the extent that they are inconsistent with such other rules; and

(B) with full recognition of the constitutional right of the Senate to change the rules (so far as relating to the procedure of the Senate) at any time, in the same manner and to the same extent as in the case of any other rule of the Senate.

(2)(A) Not later than the first day session following the day on which any notice of disapproval of a repository site selection is submitted to the Congress under section 10136 or 10138 of this title, a resolution of repository siting approval shall be introduced (by request) in the Senate by the chairman of

the committee to which such notice of disapproval is referred, or by a Member or Members of the Senate designated by such chairman.

(B) Upon introduction, a resolution of repository siting approval shall be referred to the appropriate committee or committees of the Senate, by the President of the Senate, and all such resolutions with respect to the same repository site shall be referred to the same committee or committees. Upon the expiration of 60 calendar days of continuous session after the introduction of the first resolution of repository siting approval with respect to any site, each committee to which such resolution was referred shall make its recommendations to the Senate.

(3) If any committee to which is referred a resolution of siting approval introduced under paragraph (2)(A), or, in

the absence of such a resolution, any other resolution of siting approval introduced with respect to the site involved, has not reported such resolution at the end of 60 days of continuous session of Congress after introduction of such resolution, such committee shall be deemed to be discharged from further consideration of such resolution, and such resolution shall be placed on the appropriate calendar of the Senate.

(4)(A) When each committee to which a resolution of siting approval has been referred has reported, or has been deemed to be discharged from further consideration of, a resolution described in paragraph (3), it shall at any time thereafter be in order (even though a previous motion to the same effect has been disagreed to) for any Member of the Senate to move to proceed to the

consideration of such resolution. Such motion shall be highly privileged and shall not be debatable. Such motion shall not be subject to amendment, to a motion to postpone, or to a motion to proceed to the consideration of other business. A motion to reconsider the vote by which such motion is agreed to or disagreed to shall not be in order. If a motion to proceed to the consideration of such resolution is agreed to, such resolution shall remain the unfinished business of the Senate until disposed of.

(B) Debate on a resolution of siting approval, and on all debatable motions and appeals in connection with such resolution, shall be limited to not more than 10 hours, which shall be divided equally between Members favoring and Members opposing such resolution. A motion further to limit debate shall be in order and shall not be debatable.

Such motion shall not be subject to amendment, to a motion to postpone, or to a motion to proceed to the consideration of other business, and a motion to recommit such resolution shall not be in order. A motion to reconsider the vote by which such resolution is agreed to or disagreed to shall not be in order.

(C) Immediately following the conclusion of the debate on a resolution of siting approval, and a single quorum call at the conclusion of such debate if requested in accordance with the rules of the Senate, the vote on final approval of such resolution shall occur.

(D) Appeals from the decisions of the Chair relating to the application of the rules of the Senate to the procedure relating to a resolution of siting approval shall be decided without debate.

(5) If the Senate receives from the House a resolution of repository siting

approval with respect to any site, then the following procedure shall apply:

(A) The resolution of the House with respect to such site shall not be referred to a committee.

(B) With respect to the resolution of the Senate with respect to such site--

(i) the procedure with respect to that or other resolutions of the Senate with respect to such site shall be the same as if no resolution from the House with respect to such site had been received; but

(ii) on any vote on final passage of a resolution of the Senate with respect to such site, a resolution from the House with respect to such site where the text is identical shall be automatically substituted for the resolution of the Senate.

(e) PROCEDURES APPLICABLE TO THE HOUSE OF REPRESENTATIVES.

(1) The provisions of this section are enacted by the Congress--

(A) as an exercise of the rulemaking power of the House of Representatives, and as such they are deemed a part of the rules of the House, but applicable only with respect to the procedure to be followed in the House in the case of resolutions of repository siting approval, and such provisions supersede other rules of the House only to the extent that they are inconsistent with such other rules; and

(B) with full recognition of the constitutional right of the House to change the rules (so far as relating to the procedure of the House) at any time, in the same manner and to the same extent as in the case of any other rule of the House.

(2) Resolutions of repository siting approval shall upon introduction, be

immediately referred by the Speaker of the House to the appropriate committee or committees of the House. Any such resolution received from the Senate shall be held at the Speaker's table.

(3) Upon the expiration of 60 days of continuous session after the introduction of the first resolution of repository siting approval with respect to any site, each committee to which such resolution was referred shall be discharged from further consideration of such resolution, and such resolution shall be referred to the appropriate calendar, unless such resolution or an identical resolution was previously reported by each committee to which it was referred.

(4) It shall be in order for the Speaker to recognize a Member favoring a resolution to call up a resolution of repository siting approval after it has been on the appropriate calendar for 5

legislative days. When any such resolution is called up, the House shall proceed to its immediate consideration and the Speaker shall recognize the Member calling up such resolution and a Member opposed to such resolution for 2 hours of debate in the House, to be equally divided and controlled by such Members. When such time has expired, the previous question shall be considered as ordered on the resolution to adoption without intervening motion. No amendment to any such resolution shall be in order, nor shall it be in order to move to reconsider the vote by which such resolution is agreed to or disagreed to.

(5) If the House receives from the Senate a resolution of repository siting approval with respect to any site, then the following procedure shall apply:

(A) The resolution of the Senate with respect to such site shall not be

referred to a committee.

(B) With respect to the resolution of the House with respect to such site--

(i) the procedure with respect to that or other resolutions of the House with respect to such site shall be the same as if no resolution from the Senate with respect to such site had been received; but

(ii) on any vote on final passage of resolution of the House with respect to such site, a resolution from the Senate with respect to such site where the text is identical shall be automatically substituted for the resolution of the House.

(f) COMPUTATION OF DAYS. For purposes of this section--

(1) continuity of session of Congress is broken only by an adjournment sine die; and

(2) the days on which either House is not

in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of the 90-day period referred to in subsection (c) of this section and the 60-day period referred to in subsections (d) and (e) of this section.

(g) INFORMATION PROVIDED TO CONGRESS. In considering any notice of disapproval submitted to the Congress under section 10136 or 10138 of this title, the Congress may obtain any comments of the Commission with respect to such notice of disapproval. The provision of such comments by the Commission shall not be construed as binding the Commission with respect to any licensing or authorization action concerning the repository involved.

PARTICIPATION OF STATES

SEC. 116, 42 U.S.C. 10136.

(a)NOTIFICATION OF STATES AND AFFECTED

TRIBES. The Secretary shall identify the States with one or more potentially acceptable sites for a repository within 90 days after January 7, 1983. Within 90 days of such identification, the Secretary shall notify the Governor, the State legislature, and the tribal council of any affected Indian tribe in any State of the potentially acceptable sites within such State. For the purposes of this subchapter, the term "potentially acceptable site" means any site at which, after geologic studies and field mapping but before detailed geologic data gathering, the Department undertakes preliminary drilling and geophysical testing for the definition of site location.

(b) STATE PARTICIPATION IN REPOSITORY SITING DECISIONS. (1) Unless otherwise provided by State law, the Governor or legislature of each State shall have

authority to submit a notice of disapproval to the Congress under paragraph (2). In any case in which State law provides for submission of any such notice of disapproval by any other person or entity, any reference in this subtitle to the Governor or legislature of such State shall be considered to refer instead to such other person or entity.

(2) Upon the submission by the President to the Congress of a recommendation of a site for a repository, the Governor or legislature of the State in which such site is located may disapprove the site designation and submit to the Congress a notice of disapproval. Such Governor or legislature may submit such notice of disapproval to the Congress not later than the 60 days after the date that the President recommends such site to the Congress under section 10134 of this

title. A notice of disapproval shall be considered to be submitted to the Congress on the date of the transmittal of such notice of disapproval to the Speaker of the House and the President pro tempore of the Senate. Such notice of disapproval shall be accompanied by a statement of reasons explaining why such Governor or legislature disapproved the recommended repository site involved.

(3) The authority of the Governor or legislature of each State under this subsection shall not be applicable with respect to any site located on a reservation.

(c) FINANCIAL ASSISTANCE. (1)(A) The Secretary shall make grants to the State of Nevada and any affected unit of local government ~~each State notified under subsection (a) of this section~~ for the purpose of participating in activities required by this section and section

10137 of this title or authorized by written agreement entered into pursuant to subsection 10137(c) of this title. Any salary or travel expense that would ordinarily be incurred by such State, or by any political subdivision of such State, may not be considered eligible for funding under this paragraph.

(B) The Secretary shall make grants to the State of Nevada and any affected unit of local government ~~each State in which a candidate site for a repository is approved under section 10132(c) of this title. Such grants may be made to each such State only~~ for purposes of enabling such State or affected unit of local government--

(i) to review activities taken under this subtitle with respect to the Yucca Mountain ~~such~~ site for purposes of determining any potential economic, social, public

health and safety, and environmental impacts of such repository on such ~~the~~ State or affected unit of local government and its residents;

(ii) to develop a request for impact assistance under paragraph (2);

(iii) to engage in any monitoring, testing, or evaluation activities with respect to site characterization programs with regard to such site;

(iv) to provide information to its residents regarding any activities of such State, the Secretary, or the Commission with respect to such site; and

(v) to request information from, and make comments and recommendations to, the Secretary regarding any activities taken under this subtitle with respect to such site.

(C) Any salary or travel expense that

would ordinarily be incurred by the State of Nevada or any affected unit of local government ~~such State, or by any political subdivision of such State,~~ may not be considered eligible for funding under this paragraph.

2)(A)(i) The Secretary shall provide financial and technical assistance to the State of Nevada, and any affected unit of local government ~~any State~~ requesting such assistance ~~in which there is a site with respect to which the Commission has authorized construction of a repository~~.

(ii) Such assistance shall be designed to mitigate the impact on such State or affected unit of local government of the development of such repository and the characterization of such site.

(iii) Such assistance to such State or affected unit of local government shall commence ~~within 6 months~~

~~following the granting by the Commission of a construction authorization for such repository and following~~ upon the initiation of site characterization ~~construction~~ activities ~~at such site~~.

(B) The State of Nevada and any affected unit of local government may request assistance under this subsection by preparing and submitting to the Secretary a report on the economic, social, public health and safety, and environmental impacts that are likely to result from site characterization activities at the Yucca Mountain site. Such report shall be submitted to the Secretary after the Secretary has submitted to the State a general plan for site characterization activities under section 10133(b) of this title. ~~Any State desiring assistance under this paragraph shall prepare and submit to the Secretary a report on any~~

~~economic, social, public health and safety, and environmental impacts that are likely as a result of the development of a repository at a site in such State. Such report shall be submitted to the Secretary following the completion of site characterization activities at such site and before the recommendation of such site to the President by the Secretary for application for a construction authorization for a repository. As soon as practicable following the granting of a construction authorization for such repository, the Secretary shall seek to enter into a binding agreement with the State involved setting forth the amount of assistance to be provided to such State under this paragraph and the procedures to be followed in providing such assistance.~~

(C) As soon as practicable after the Secretary has submitted such site

characterization plan, the Secretary shall seek to enter into a binding agreement with the State of Nevada setting forth--

(i) the amount of assistance to be provided under this subsection to such State or affected unit of local government; and

(ii) the procedures to be followed in providing such assistance.

(3)(A) In addition to financial assistance provided under paragraphs (1) and (2), the Secretary shall ~~also~~ grant to ~~each State and~~ the State of Nevada and any affected unit of ~~general~~ local government ~~in which a site for a repository is approved under section 10132(c) of this title~~ an amount each fiscal year equal to the amount such State or affected unit of local government, respectively, would receive ~~were they~~ if authorized to tax site

characterization activities at such site, and the development and operation of such repository, as such State ~~and~~ or affected unit of local government ~~tax~~ taxes the ~~other~~ non-Federal real property and industrial activities occurring within such State ~~and~~ or affected unit of ~~general~~ local government. (B) Such grants shall continue until such time as all such activities, development, and operation are terminated at such site.

(4)(A) ~~A State~~ The State of Nevada or any affected unit of local government may not receive any grant under paragraph (1) after the expiration of the 1-year period following--

(i) the date on which the Secretary notifies the Governor and legislature of the State of Nevada of the termination of site characterization activities at the ~~candidate~~ site ~~involved~~ in such

State;

(ii) the date on which the Yucca Mountain site ~~in such State~~ is disapproved under section 10135 of this title; or

(iii) the date on which the Commission disapproves an application for a construction authorization for a repository at such site;

whichever occurs first. ~~unless there is another candidate site in the State approved under section 10132(c) of this title with respect to which the actions described in clauses (i), (ii), and (iii) have not been taken~~.

(B) ~~A State~~ The State of Nevada or any affected unit of local government may not receive any further assistance under paragraph (2) with respect to a site if repository construction activities or site characterization activities at such

site are terminated by the Secretary or if such activities are permanently enjoined by any court.

(C) At the end of the 2-year period beginning on the effective date of any license to receive and possess for a repository in a State, no Federal funds, shall be made available to such State or affected unit of local government under paragraph (1) or (2), except for--

(i) such funds as may be necessary to support ~~State~~ activities related to any other repository located in, or proposed to be located in, such State, and for which a license to receive and possess has not been in effect for more than 1 year;

(ii) such funds as may be necessary to support State activities pursuant to agreements or contracts for impact assistance entered into, under paragraph (2), by such State

with the Secretary during such 2-year period; and

(iii) such funds as may be provided under an agreement entered into under title IV of this chapter.

(5) Financial assistance authorized in this subsection shall be made out of amounts held in the Nuclear Waste Fund ~~established in section 10222 of this title~~.

(6) No State, other than the State of Nevada, may receive financial assistance under this subsection after the date of the enactment of the Nuclear Waste Policy Amendments Act of 1987.

(d) ADDITIONAL NOTIFICATION AND CONSULTATION. Whenever the Secretary is required under any provision of this Chapter to notify or consult with the governing body of an affected Indian tribe where a site is located, the Secretary shall also notify or consult

with, as the case may be, the Governor of the State in which such reservation is located.

JUDICIAL REVIEW OF AGENCY ACTIONS

SEC. 119, 42 U.S.C. 10139.

(a)JURISDICTION OF UNITED STATES COURTS OF APPEALS. (1) Except for review in the Supreme Court of the United States, the United States courts of appeals shall have original and exclusive jurisdiction over any civil action--

(A) for review of any final decision or action of the Secretary, the President, or the Commission under this part;

(B) alleging the failure of the Secretary, the President, or the Commission to make any decision, or take any action, required under this part;

(C) challenging the constitutionality of any decision made, or action taken, under any provision of this part;

(D) for review of any environmental

impact statement prepared pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) with respect to any action under this part, or as required under section 10135(c)(1) of this title, or alleging a failure to prepare such statement with respect to any such action;

(E) for review of any environmental assessment prepared under section 10132(b)(1) or 10135(c)(2) of this title; or

(F) for review of any research and development activity under subchapter II of this chapter.

(2) The venue of any proceeding under this section shall be in the judicial circuit in which the petitioner involved resides or has its principal office, or in the United States Court of Appeals for the District of Columbia.

(c) DEADLINE FOR COMMENCING ACTION. A

civil action for judicial review described under subsection (a)(1) of this section may be brought not later than the 180th day after the date of the decision or action or failure to act involved, as the case may be, except that if a party shows that he did not know of the decision or action complained of (or of the failure to act), and that a reasonable person acting under the circumstances would not have known, such party may bring a civil action not later than the 180th day after the date such party acquired actual or constructive knowledge of such decision, action, or failure to act.

SUBTITLE E--REDIRECTION OF THE NUCLEAR WASTE PROGRAM

SELECTION OF YUCCA MOUNTAIN SITE

SEC. 160, 42 U.S.C 10172 (a) IN GENERAL. (1) The Secretary shall provide for an orderly phase-out of site specific

activities at all candidate sites other than the Yucca Mountain site.

(2) The Secretary shall terminate all site specific activities (other than reclamation activities) at all candidate sites, other than the Yucca Mountain site, within 90 days after December 22, 1987.

(b) Effective on December 22, 1987, the State of Nevada shall be eligible to enter into a benefits agreement with the Secretary under section 10173 of this title.

NUCLEAR WASTE FUND

SEC. 302, 42 U.S.C. 10222. (a)CONTRACTS. (1) In the performance of his functions under this Chapter, the Secretary is authorized to enter into contracts with any person who generates or holds title to high-level radioactive waste, or spent nuclear fuel, of domestic origin for the acceptance of title, subsequent

transportation, and disposal of such waste or spent fuel. Such contracts shall provide for payment to the Secretary of fees pursuant to paragraphs (2) and (3) sufficient to offset expenditures described in subsection (d) of this section.

(2) For electricity generated by a civilian nuclear power reactor and sold on or after the date 90 days after the date of enactment of this Act, the fee under paragraph (1) shall be equal to 1.0 mil per kilowatt-hour.

(3) For spent nuclear fuel, or solidified high-level radioactive waste derived from spent nuclear fuel, which fuel was used to generate electricity in a civilian nuclear power reactor prior to the application of the fee under paragraph (2) to such reactor, the Secretary shall, not later than 90 days after January 7, 1983, establish a 1 time fee per kilogram

of heavy metal in spent nuclear fuel, or in solidified high-level radioactive waste. Such fee shall be in an amount equivalent to an average charge of 1.0 mil per kilowatt-hour for electricity generated by such spent nuclear fuel, or such solidified high-level waste derived therefrom, to be collected from any person delivering such spent nuclear fuel or high-level waste, pursuant to section 10143 of this title, to the Federal Government. Such fee shall be paid to the Treasury of the United States and shall be deposited in the separate fund established by subsection (c) of this section. In paying such a fee, the person delivering spent fuel, or solidified high-level radioactive wastes derived therefrom, to the Federal Government shall have no further financial obligation to the Federal Government for the long-term storage and

permanent disposal of such spent fuel, or the solidified high-level radioactive waste derived therefrom.

(4) Not later than 180 days after January 7, 1983, the Secretary shall establish procedures for the collection and payment of the fees established by paragraph (2) and paragraph (3). The Secretary shall annually review the amount of the fees established by paragraphs (2) and (3) above to evaluate whether collection of the fee will provide sufficient revenues to offset the costs as defined in subsection (d) of this section. In the event the Secretary determines that either insufficient or excess revenues are being collected, in order to recover the costs incurred by the Federal Government that are specified in subsection (d) of this section, the Secretary shall propose an adjustment to the fee to insure full cost recovery.

The Secretary shall immediately transmit this proposal for such an adjustment to Congress. The adjusted fee proposed by the Secretary shall be effective after a period of 90 days of continuous session have elapsed following the receipt of such transmittal unless during such 90-day period either House of Congress adopts a resolution disapproving the Secretary's proposed adjustment in accordance with the procedures set forth for congressional review of an energy action under section 6241 of this title.

(5) Contracts entered into under this section shall provide that --

(A) following commencement of operation of a repository, the Secretary shall take title to the high-level radioactive waste or spent nuclear fuel involved as expeditiously as practicable upon the request of the generator or owner of such waste or spent fuel; and

(B) in return for the payment of fees established by this section, the Secretary, beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel involved as provided in this subchapter.

(6) The Secretary shall establish in writing criteria setting forth the terms and conditions under which such disposal services shall be made available.

(b) ADVANCE CONTRACTING REQUIREMENT.

(1)(A) The Commission shall not issue or renew a license to any person to use a utilization or production facility under the authority of section 2133 or 2134 of this title unless--

(i) such person has entered into a contract with the Secretary under this section; or

(ii) the Secretary affirms in writing that such person is actively

and in good faith negotiating with the Secretary for a contract under this section.

(B) The Commission, as it deems necessary or appropriate, may require as a precondition to the issuance of renewal of a license under section 2133 or 2134 of this title that the applicant for such license shall have entered into an agreement with the Secretary for the disposal of high-level radioactive waste and spent nuclear fuel that may result from the use of such license.

(2) Except as provided in paragraph (1), no spent nuclear fuel or high-level radioactive waste generated or owned by any person (other than a department of the United States referred to in section 101 or 102 of title 5) may be disposed of by the Secretary in any repository constructed under this Act unless the generator or owner of such spent fuel or

waste has entered into a contract with the Secretary under this section by not later than--

(A) June 30, 1983; or

(B) the date on which such generator or owner commences generation of, or takes title to, such spent fuel or waste;

whichever occurs later.

(3) The rights and duties of a party to a contract entered into under this section may be assignable with transfer of title to the spent nuclear fuel or high-level radioactive waste involved.

(4) No high-level radioactive waste or spent nuclear fuel generated or owned by any department of the United States referred to in section 101 or 102 of title 5, United States Code, may be disposed of by the Secretary in any repository constructed under this Act unless such department transfers to the

Secretary, for deposit in the Nuclear Waste Fund, amounts equivalent to the fees that would be paid to the Secretary under the contracts referred to in this section if such waste or spent fuel were generated by any other person.

(c) ESTABLISHMENT OF NUCLEAR WASTE FUND. There hereby is established in the Treasury of the United States a separate fund, to be known as the Nuclear Waste Fund. The Waste Fund shall consist of--

(1) all receipts, proceeds, and recoveries realized by the Secretary under subsections (a), (b), and (e), which shall be deposited in the Waste Fund immediately upon their realization;

(2) any appropriations made by the Congress to the Waste Fund; and

(3) any unexpended balances available on the date of the enactment of this Act for functions

or activities necessary or incident to the disposal of civilian high-level radioactive waste or civilian spent nuclear fuel, which shall automatically be transferred to the Waste Fund on such date.

(d) USE OF WASTE FUND.--The Secretary may make expenditures from the Waste Fund, subject to subsection (e), only for purposes of radioactive waste disposal activities under subchapters I and II of this chapter, including--

(1) the identification, development, licensing, construction, operation, decommissioning, and post-decommissioning maintenance and monitoring of any repository, monitored, retrievable storage facility or test and evaluation facility constructed under this Chapter;

(2) the conducting of nongeneric

research, development, and demonstration activities under this Chapter;

(3) the administrative cost of the radioactive waste disposal program;

(4) any costs that may be incurred by the Secretary in connection with the transportation, treating, or packaging of spent nuclear fuel or high-level radioactive waste to be disposed of in a repository, to be stored in a monitored, retrievable storage site or to be used in a test and evaluation facility;

(5) the costs associated with acquisition, design, modification, replacement, operation, and construction of facilities at a repository site, a monitored, retrievable storage site or a test and evaluation facility site and necessary or incident to such

repository, monitored, retrievable storage facility or test and evaluation facility; and

(6) the provision of assistance to States, units of general local government, and Indian tribes under sections 10136, 10138, and 10199 of this title.

No amount may be expended by the Secretary under this subchapter for the construction or expansion of any facility unless such construction or expansion is expressly authorized by this or subsequent legislation. The Secretary hereby is authorized to construct one repository and one test and evaluation facility.

(e) ADMINISTRATION OF WASTE FUND.--(1) The Secretary of the Treasury shall hold the Waste Fund and, after consultation with the Secretary, annually report to the Congress on the financial condition

and operations of the Waste Fund during the preceding fiscal year.

(2) The Secretary shall submit the budget of the Waste Fund to the Office of Management and Budget triennially along with the budget of the Department of Energy submitted at such time in accordance with chapter 11 of title 31 United States Code. The budget of the Waste Fund shall consist of the estimates made by the Secretary of expenditures from the Waste Fund and other relevant financial matters for the succeeding 3 fiscal years, and shall be included in the Budget of the United States Government. The Secretary may make expenditures from the Waste Fund, subject to appropriations which shall remain available until expended. Appropriations shall be subject to triennial authorization.

(3) If the Secretary determines that the

Waste Fund contains at any time amounts in excess of current needs, the Secretary may request the Secretary of the Treasury to invest such amounts, or any portion of such amounts as the Secretary determines to be appropriate, in obligations of the United States--

(A) having maturities determined by the Secretary of the Treasury to be appropriate to the needs of the Waste Fund; and

(B) bearing interest at rates determined to be appropriate by the Secretary of the Treasury, taking into consideration the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the maturities of such investments, except that the interest rate on such investments shall not exceed the average interest rate applicable to existing borrowings.

(4) Receipts, proceeds, and recoveries realized by the Secretary under this section, and expenditures of amounts from the Waste Fund, shall be exempt from annual apportionment under the provisions of subchapter II of chapter 15 of title 31.

(5) If at any time the moneys available in the Waste Fund are insufficient to enable the Secretary to discharge his responsibilities under this subchapter, the Secretary shall issue to the Secretary of the Treasury obligations in such forms and denominations, bearing such maturities, and subject to such terms and conditions as maybe agreed to by the Secretary and the Secretary of the Treasury. The total of such obligations shall not exceed amounts provided in appropriation Acts. Redemption of such obligations shall be made by the Secretary from moneys available in the

Waste Fund. Such obligations shall bear interest at a rate determined by the Secretary of the Treasury, which shall be not less than a rate determined by taking into consideration the average market yield on outstanding marketable obligations of the United States of comparable maturities during the month preceding the issuance of the obligations under this paragraph. The Secretary of the Treasury shall purchase any issued obligations, and for such purpose the Secretary of the Treasury is authorized to use as a public debt transaction the proceeds from the sale of any securities issued under chapter 31 of title 31, and the purposes for which securities maybe issued under such Act are extended to include any purchase of such obligations. The Secretary of the Treasury may at any time sell any of the obligations acquired by him under this paragraph. All

redemptions, purchases, and sales by the Secretary of the Treasury of obligations under this paragraph shall be treated as public debt transactions of the United States.

(6) Any appropriations made available to the Waste Fund for any purpose described in subsection (d) of this section shall be repaid into the general fund of the Treasury, together with interest from the date of availability of the appropriations until the date of repayment. Such interest shall be paid on the cumulative amount of appropriations available to the Waste Fund, less the average undisbursed cash balance in the Waste Fund account during the fiscal year involved. The rate of such interest shall be determined by the Secretary of the Treasury taking into consideration the average market yield during the month preceding each fiscal

year on outstanding marketable obligations of the United States of comparable maturity. Interest payments may be deferred with the approval of the Secretary of the Treasury, but any interest payments so deferred shall themselves bear interest.

ENVIRONMENTAL IMPACT STATEMENT

SEC. 407. 42 U.S.C. 10247 (a) IN GENERAL. Issuance of a construction authorization for a repository or monitored retrievable storage facility under section 10245(b) of this title shall be considered a major Federal action significantly affecting the quality of the human environment for purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(b) PREPARATION. A final environmental impact statement shall be prepared by the Secretary under such Act and shall accompany any application to the Nuclear

Regulatory Commission for a construction authorization.

(c) ADOPTION. (1) Any such environmental impact statement shall, to the extent practicable, be adopted by the Nuclear Regulatory Commission, in accordance with section 1506.3 of title 40, Code of Federal Regulations, in connection with the issuance by the Nuclear Regulatory Commission of a construction authorization and license for such repository or monitored retrievable storage facility.

(2)(A) In any such statement prepared with respect to a repository to be constructed under this title at the Yucca Mountain site, the Nuclear Regulatory Commission need not consider the need for a repository, the time of initial availability of a repository, alternate sites to the Yucca Mountain site, or nongeologic alternatives to such site.

(B) In any such statement prepared with respect to a repository to be constructed under this title at a site other than the Yucca Mountain site, the Nuclear Regulatory Commission need not consider the need for a repository, the time of initial availability of a repository, or nongeologic alternatives to such site but shall consider the Yucca Mountain site as an alternate to such site in the preparation of such statement.

10 C.F.R. 60.2 DEFINITIONS

"High-level radioactive waste" or "HLW" means: (1) Irradiated reactor fuel, (2) liquid wastes resulting from the operation of the first cycle solvent extraction system, or equivalent, and the concentrated wastes from subsequent extraction cycles, or equivalent, in a facility for reprocessing irradiated reactor fuel, and (3) solids into which such liquid wastes have been converted.

10 C.F.R. 60.121

LAND OWNERSHIP AND CONTROL

Requirements for ownership and control of interests in land.

(a) *Ownership of land.* (1) Both the geologic repository operations area and the controlled area shall be located in and on lands that are either acquired lands under the jurisdiction and control

of DOE, or lands permanently withdrawn and reserved for its use.

(2) These lands shall be held free and clear of all encumbrances, if significant, such as: (i) Rights arising under the general mining laws; (ii) easements for right-of-way; and (iii) all other rights arising under lease, rights of entry, deed, patent, mortgage, appropriation, prescription, or otherwise.

(b) *Additional controls.* Appropriate controls shall be established outside of the controlled area. DOE shall exercise any jurisdiction and control over surface and subsurface estates necessary to prevent adverse human actions that could significantly reduce the geologic repository's ability to achieve isolation. The rights of DOE may take the form of appropriate possessory interests, servitudes, or withdrawals

from location or patent under the general mining laws.

(c) *Water rights.* (1) DOE shall also have obtained such water rights as may be needed to accomplish the purpose of the geologic repository operations area.

(2) Water rights are included in the additional controls to be established under paragraph (b) of this section.

10 C.F.R. Part 960

Note: The Department of Energy's Guidelines in 10 C.F.R. Part 960 are voluminous. Individual sections may be germane to an argument in a brief on the merits. Since individual sections were not cited in the Petition For Writ Of Certiorari and because a reference to individual sections is not necessary to an understanding of the Petition, none of 10 C.F.R. Part 960 is reproduced in the Appendix.

ASSEMBLY JOINT RESOLUTION NO. 4.

WHEREAS, Because of the extremely dangerous nature of high-level nuclear waste and the persistence of that danger for an extended period, the location of such waste in a repository in this state poses a serious hazard to the health and welfare of Nevadans; and

WHEREAS, The residents of the State of Nevada are overwhelmingly opposed to permitting Nevada to become the dumping ground for nuclear waste generated in other states and foreign countries; now, therefore be it

RESOLVED BY THE ASSEMBLY AND SENATE OF THE STATE OF NEVADA, JOINTLY, That the Nevada Legislature expresses its adamant opposition to the placement of a high-level nuclear waste repository in the State of Nevada; and be it further

RESOLVED, That a copy of this resolution

be transmitted forthwith by the Chief Clerk of the Assembly to the President of the United States, the Vice President of the United States as the presiding officer of the Senate, the Speaker of the House of Representatives and to each member of the Nevada Congressional Delegation; and be it further

RESOLVED, That this resolution becomes effective upon passage and approval.

ASSEMBLY JOINT RESOLUTION NO. 6.

WHEREAS, On December 22, 1987, Congress enacted the Nuclear Waste Policy Amendments Act of 1987, specifying Yucca Mountain, Nevada, as the sole location for evaluation as a suitable site for the placement of a national repository for high-level radioactive waste; and

WHEREAS, The Nuclear Waste Policy Amendments Act of 1987 represents just one of the many instances of federal

overreaching with regard to the public land in this state; and

WHEREAS, The Federal Government claims ownership of approximately 87 percent of the total land in the State of Nevada, and has targeted that land for certain undesirable federal programs; and

WHEREAS, The placement of a repository for high-level radioactive waste in the State of Nevada poses serious concerns about the transportation and storage of such waste and the potential harm to the environment and health of the residents and guests of this state; and

WHEREAS, The Nevada economy is dependent upon tourism and the perception of a safe environment; and

WHEREAS, The United States has a duty to protect the economy, environment and public health of this state, which the Nevada Legislature is empowered to protect and preserve; and

WHEREAS, The Federal Government has refused to assume full liability for any deleterious effects that could result from the placement of a repository for high-level radioactive waste in Nevada; and

WHEREAS, Various polls of the people of this state, including our children in school, demonstrate an over whelming opposition to the location of a repository for high-level radioactive waste at Yucca Mountain; now, therefore, be it

RESOLVED BY THE ASSEMBLY AND SENATE OF THE STATE OF NEVADA, JOINTLY, That the Federal Government, its agencies and instrumentalities shall not establish a repository for high-level radioactive waste at Yucca Mountain, Nevada, without the prior consent of the Nevada Legislature or a cession of jurisdiction pursuant to chapter 328 of the Nevada

Revised Statutes, which consent and cession are hereby refused; and be it further

RESOLVED, That copies of this resolution be prepared and transmitted forthwith by the Chief Clerk of the Assembly to the President of the United States, the Vice President of the United States as the presiding officer of the Senate, the Speaker of the House of Representatives and to each member of the Nevada Congressional Delegation; and be it further

RESOLVED, That this resolution becomes effective upon passage and approval.

NEVADA REVISED STATUTE

NRS 459.910:

1. It is unlawful for any person or governmental entity to store high-level radioactive waste in Nevada.

2. As used in this section, unless

the context otherwise requires, "high-level radioactive waste" has the meaning ascribed to that term in 10 C.F.R. § 60.2.

Supreme Court, U.S.
FILED
FEB 12 1991
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DISTRIBUTED
FEB 12 1991

No. 90-992

STATE OF NEVADA ET AL., PETITIONERS

v.

JAMES D. WATKINS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPPOSITION OF THE FEDERAL RESPONDENTS TO MOTION TO DEFER CONSIDERATION

The Solicitor General, on behalf of the Secretary of Energy and the Department of Energy, hereby opposes the Motion to Defer Consideration filed by the petitioners in this case. Petitioners, the State of Nevada and various officials and representatives of the State, seek review of a decision of the United States Court of Appeals for the Ninth Circuit that rejected their constitutional and statutory challenges to the implementation of the Nuclear Waste Policy Act, 43 U.S.C. 10101 et seq. Pet. App. 1-37. In that statute, Congress has directed the Department of Energy to characterize a site in Nevada known as Yucca Mountain as a potential location for a permanent underground nuclear waste

repository. 43 U.S.C. 10133(a). Petitioners seek to defer consideration of their petition for a writ of certiorari in this case until disposition of another petition, not yet filed, in a separate case brought by the State against the Bureau of Land Management, an agency of the Department of the Interior. That agency granted a right-of-way pursuant to the Federal Land Policy and Management Act, 43 U.S.C. 1761, which permits the Department of Energy to use public lands in the vicinity of Yucca Mountain for the site characterization program. The district court dismissed the State's complaint challenging the right-of-way for lack of standing, and the court of appeals affirmed. 918 F.2d 854 (1990) (copy attached). The Department of Energy is not a party to the latter case.

Although in each case the State is attempting to prevent the carrying out of site characterization activities, in this Court each case presents distinctly different issues. In the present case, No. 90-992, the State presents several direct challenges to the constitutionality of the Nuclear Waste Policy Act, as well as to the Department of Energy's implementation of the statute, all of which the court of appeals rejected on their merits. Pet. App. 13-37. In its complaint against the Bureau of Land Management, the State included some of these same claims, but the court of appeals decided only that the complaint had failed to allege any basis for satisfying the standing requirements of Article III. 918 F.2d at 855-858. There are no common questions, and thus nothing about the

relationship between the two cases that would warrant deferring disposition of the petition in No. 90-992.

Moreover, delay in the consideration of No. 90-992 will result in continued frustration of the Congressional mandate to characterize the Yucca Mountain site. In order to carry out this program, the Department of Energy must obtain permits from State agencies exercising delegated authority under the Clean Air Act, 42 U.S.C. 7401 et seq., and the Safe Drinking Water Act, 42 U.S.C. 300f et seq., as well as a permit to appropriate water for the project. The State's motion fails to mention the fact that the State has rejected the Department of Energy's permit applications solely because of the effect of three state legislative enactments purporting to make site characterization activities illegal under state law. Pet. App. 9-11. As a result, the United States filed suit more than a year ago in the United States District Court for the District of Nevada seeking an injunction requiring the State to process the applications. United States v. State of Nevada, No. CV-S-90-065-HDM. The United States argues that these state laws have been preempted by the Nuclear Waste Policy Act. This contention was subsequently sustained in the court of appeals decision under review in No. 90-992, which originated in the court of appeals as a separate proceeding.

In response to the repeated request of the State, the district court in United States v. State of Nevada, supra, first stayed proceedings pending the court of appeals decision, and now has stayed disposition of the United States' motion for summary

judgment pending the disposition of the petition for a writ of certiorari filed in No. 90-992 (Orders dated May 23, 1990, and December 14, 1990, copies attached). Any further delay in the disposition of the petition is significantly prejudicial to the ability of the Department of Energy to carry out the will of Congress.

CONCLUSION

For the reasons stated above, the motion to defer consideration should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

FEBRUARY 1991

the crime." *Runco*, 873 F.2d at 1232. Thus, there was sufficient evidence to support Hadley's conviction on count eight.

V

[12] Finally, Hadley contends that the district court erred by imposing a sentence not in accordance with the Sentencing Guidelines for his conviction on count seven. The district court did not apply the Sentencing Guidelines in imposing a 30-year sentence on that conviction. The court did follow the Sentencing Guidelines when it sentenced Hadley to nine years in prison on counts eight and nine.

Hadley's contention is without merit. We have held that the Sentencing Guidelines do not apply to conduct that occurred before November 1, 1987. *United States v. Gray*, 876 F.2d 1411, 1418 (9th Cir.1989), *cert. denied*, — U.S. —, 110 S.Ct. 2168, 109 L.Ed.2d 497 (1990). There is no dispute that the conduct underlying the count seven conviction occurred in October 1987, prior to the effective date of the Sentencing Guidelines. Thus, the district court did not err when it declined to apply the guidelines to count seven.

AFFIRMED.

STATE OF NEVADA,
Plaintiff-Appellant,

v.

Robert F. BURFORD, Director of Bureau of Land Management, Department of Interior; Edward F. Spang, Nevada State Director, Bureau of Land Management, Department of Interior, Defendants-Appellees.

No. 89-15272.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Aug. 16, 1990.

Decided Nov. 14, 1990.

State of Nevada brought action challenging Bureau of Land Management's grant of right-of-way to Department of Energy to conduct site characterization study of proposed nuclear waste repository. The United States District Court for the District of Nevada, Philip M. Pro, J., dismissed action, 708 F.Supp. 289, and State appealed. The Court of Appeals, Wallace, Circuit Judge, held that Nevada failed to show that it would suffer concrete and immediate injury as result of grant of right-of-way, and did not have standing to challenge grant.

Affirmed.

1. Federal Courts ⇐557

Where district court has inadvertently neglected to dismiss action but it is clear it intended its order to terminate action, Court of Appeals treats action as dismissed.

2. Federal Courts ⇐555

Order which dismissed complaint but which did not dismiss underlying action was appealable, where it was clear that ruling by district court was meant to be dispositive of action. 28 U.S.C.A. §§ 1291, 1331.

3. Federal Civil Procedure ⇐103.1
Federal Courts ⇐12

"Case or controversy" limitation in article III of the Constitution requires that federal courts visit threshold question of standing in every federal case; in order to clear this jurisdictional hurdle, complaining party must demonstrate injury in fact. U.S.C.A. Const. Art. 3, § 1 et seq.

4. Health and Environment ⇐25.15(4)

State of Nevada failed to show that it would suffer concrete and immediate injury as result of Bureau of Land Management's grant of right-of-way to Department of Energy to conduct site characterization study of proposed nuclear waste repository, and did not have standing to challenge grant; land was owned by federal government, and State did not allege that it used site for

any purpose. Nuclear Waste Policy Act of 1982, § 2 et seq., as amended, 42 U.S.C.A. § 10101 et seq.; Federal Land Policy and Management Act of 1976, § 102 et seq., 43 U.S.C.A. § 1701 et seq.; National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.; U.S.C.A. Const. Art. 3, § 1 et seq.

Harry W. Swainston, Deputy Atty. Gen., Carson City, Nev., for plaintiff-appellant.

George W. Vancleve, U.S. Dept. of Justice, Washington, D.C., for defendants-appellees.

Appeal from the United States District Court for the District of Nevada.

Before WALLACE, ALARCON and WIGGINS, Circuit Judges.

WALLACE, Circuit Judge:

[1, 2] Nevada appeals from the dismissal of its complaint against the Bureau of Land Management (Bureau), in which Nevada alleges that the Bureau improperly granted a right-of-way to the Department of Energy (Department) to conduct site characterization studies at Yucca Mountain, Nevada. The district court concluded that Nevada lacked standing to pursue this action, and dismissed the complaint. The district court exercised jurisdiction pursuant to 28 U.S.C. § 1331. Our court has no jurisdiction to review a dismissed complaint; a judgment is not final until the underlying action is dismissed. Where the district court has inadvertently neglected to dismiss the action but it is clear it intended its order to terminate the action, we treat the action as dismissed. *Kilkenny v. Arco Marine Inc.*, 800 F.2d 853, 855–56 (9th Cir.1986), *cert. denied*, 480 U.S. 934, 107 S.Ct. 1575, 94 L.Ed.2d 766 (1987). Here it is clear that the ruling by the district court was meant to be dispositive of the action. Therefore, we have jurisdiction over this timely appeal under 28 U.S.C. § 1291. We affirm.

I

In February of 1983, Nevada was notified that certain public lands near Yucca Mountain were under consideration as a national repository for the disposal of nuclear waste. Four years later, Congress decided to concentrate waste repository development efforts on the Yucca Mountain site. Accordingly, Congress amended the Nuclear Waste Policy Act (Waste Act), 42 U.S.C. §§ 10101–10270, to require that site characterization activities proceed solely at Yucca Mountain. *Id.* § 10133(a). Site characterization consists of extensive testing conducted by the Department in order to evaluate the suitability of a site for the location of a repository. *Id.* § 10101(21).

In order to aid the Department in its site characterization activities, the Waste Act provides,

> [t]o the extent that the taking of any action related to the site characterization of a site ... requires a certificate, *right-of-way*, permit, lease, or other authorization from a Federal agency or officer, such agency or officer shall issue or grant any such authorization at the earliest practicable date, to the extent permitted by the applicable provisions of law administered by such agency or officer.

42 U.S.C. § 10140(1) (emphasis added). Pursuant to this section, the Department applied to the Bureau in November 1987 for a right-of-way over public land near Yucca Mountain. This land is administered by the Bureau under the Federal Land Policy and Management Act of 1976 (Land Act), 43 U.S.C. §§ 1701–1784 which directs the Bureau to manage the land in a way "that will best meet the present and future needs of the American people." *Id.* § 1702(c). On January 6, 1988, the Bureau granted to the Department a 13 year right-of-way over 51,632 public acres near Yucca Mountain, and authorized the Department to undertake necessary site characterization activities on that land in accordance with the Department's Plan of Development.

Under this plan, the Department intends to excavate several exploratory shafts and conduct a variety of scientific tests. The

Department has stated that site characterization activities should not interfere with any current or planned activities on the lands within the right-of-way. It promises "to return lands disturbed by site characterization to a stable ecological state with a form and productivity similar to the predisturbance state." Moreover, the right-of-way granted by the Bureau prohibits the disposal of any hazardous materials on the land, and states that it "does not convey any rights for the construction or initial operation of a nuclear waste repository."

Nevada filed an action in the district court challenging the grant of this right-of-way. Nevada alleged that the grant violated requirements in both the Land Act and the National Environmental Policy Act (Environmental Act). In addition, it claimed that the Bureau's actions violated Nevada's constitutional right, including that the right-of-way rendered meaningless Nevada's political right to object to its selection as a waste repository site. The district court determined that Nevada lacked standing to pursue the action, and concluded that the constitutional claims were without merit.

II

We review de novo the district court's legal conclusion that Nevada lacks standing. *Bruce v. United States*, 759 F.2d 755, 758 (9th Cir.1985). Moreover, for purposes of this review, we must construe the complaint in favor of Nevada, and accept as true all of Nevada's material allegations. *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975).

[3] The "case or controversy" limitation in article III of the Constitution requires that federal courts visit the "threshold question" of standing in every federal case. *Id.* at 498, 95 S.Ct. at 2205. In order to clear this jurisdictional hurdle, a complaining party must demonstrate an injury in fact. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 473, 102 S.Ct. 752, 759, 70 L.Ed.2d 700 (1982) (*Valley Forge*). The Supreme Court has held that this constitutional injury requirement embraces three related elements: (1) an actual or threatened injury, (2) which is fairly traceable to the defendant's allegedly unlawful conduct, and (3) which is likely to be redressed by the relief requested. *See Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984) (*Allen*); *Valley Forge*, 454 U.S. at 472, 102 S.Ct. at 758; *Alaska Fish & Wildlife Federation v. Dunkle*, 829 F.2d 933, 937 (9th Cir.1987), *cert. denied*, 485 U.S. 988, 108 S.Ct. 1290, 99 L.Ed.2d 501 (1988).

[4] To satisfy the first of these requirements, Nevada must show that it "has been or will in fact be perceptibly harmed by" the decision of the Bureau to grant the right-of-way. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688, 93 S.Ct. 2405, 2416, 37 L.Ed.2d 254 (1973). Thus, Nevada must demonstrate that it has suffered or will in fact suffer "concrete and immediate" injury on account of the right-of-way grant. *Rapid Transit Advocates, Inc. v. Southern California Rapid Transit District*, 752 F.2d 373, 378 (9th Cir. 1985). This it has failed to do.

Nevada's complaint contains allegations that the Bureau's decision to issue the right-of-way violated several constitutional and statutory provisions. For example, Nevada contends that the Bureau violated requirements of the Land Act by issuing the right-of-way because in order to permit the Department to occupy the land surrounding Yucca Mountain, the Bureau was required to use the withdrawal procedure specified in 43 U.S.C. § 1714. Nevada further argues that the environmental assessment accepted by the Bureau in connection with the right-of-way grant is insufficient to satisfy the requirements imposed by the Environmental Act. In addition, Nevada contends that issuance of the right-of-way violates many constitutional provisions, including the tenth amendment.

However, the complaint is silent as to how these alleged violations have resulted in injury to Nevada. "[A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone,

to confer jurisdiction on a federal court." *Allen*, 468 U.S. at 754, 104 S.Ct. at 3326; *see also Diamond v. Charles*, 476 U.S. 54, 62, 106 S.Ct. 1697, 1703, 90 L.Ed.2d 48 (1986) ("The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements."). The federal government, not Nevada, owns the land in question. Moreover, Nevada did not allege in its complaint that it uses the land surrounding Yucca Mountain for any purpose. Even assuming that the right-of-way grant violates the Land Act, the Environmental Act, and the Constitution, Nevada fails to show how those violations result in injury to Nevada. We agree with the district court that Nevada's claims merely "constitute a generalized grievance that the [Bureau] is not acting in a way in which [Nevada] maintains is in accordance" with federal laws. *Nevada v. Burford*, 708 F.Supp. 289, 295 (D.Nev.1989) (*Burford*). This is insufficient to demonstrate standing. *See Allen*, 468 U.S. at 754, 104 S.Ct. at 3326; *Valley Forge*, 454 U.S. at 482–83, 102 S.Ct. at 763–64; *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 223 n. 13, 94 S.Ct. 2925, 2933 n. 13, 41 L.Ed.2d 706 (1974).

In addition to contending that the right-of-way grant violated several federal statutes and the Constitution, Nevada asserts that its political right to object to its selection as the host for a nuclear waste repository has been rendered meaningless by the Bureau's action. It is clear that a state may demonstrate standing by asserting an injury to a sovereign interest. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601, 102 S.Ct. 3260, 3265, 73 L.Ed.2d 995 (1982) (*Snapp*). What constitutes a state's sovereign interest is not free from doubt. *Id.* But in this appeal, we need not analyze its nature or parameters. Nevada argues that one of its sovereign interests—the right to object in the political arena to the selection of Yucca Mountain as a waste repository—has been infringed. Assuming such an identifiable sovereign interest, Nevada's argument ignores the fact that the decision of whether to construct the repository at Yucca Mountain is many years and numerous procedural hurdles away. For example, if the Department determines that Yucca Mountain is an appropriate site after site characterization is completed, the Department must hold public hearings near the site to receive comments regarding its suitability. 42 U.S.C. § 10134(a). Following this, the Department must make a recommendation to the President whether to construct the repository, who in turn must decide whether to recommend the site to Congress. *Id.* Within 60 days of the President's recommendation to Congress, the state in which the recommended site is located may file a notice of disapproval with Congress. *Id.* § 10136(b)(2). If such a notice is filed, the site selection is disapproved unless Congress passes a resolution as required by the Waste Act within 90 days. *Id.* § 10135(c). We deal here only with the decision by the Bureau to grant a right-of-way, the only "direct consequence [of which] is that the site characterization process will proceed to the next step in accordance with the [Waste Act]." *Burford*, 708 F.Supp. at 297. Any claim by Nevada that site characterization will inevitably lead to the designation of Yucca Mountain as a repository site is mere speculation, and "unadorned speculation will not suffice to invoke the federal judicial power." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 44, 96 S.Ct. 1917, 1927, 48 L.Ed.2d 450 (1976). Clearly, the right-of-way decision has not stripped Nevada of its right to participate in the site characterization process or of its right to object to the selection of Yucca Mountain as a repository. Thus, because Nevada has failed to show how it has been injured in this respect, its claim of standing based on its asserted sovereign interest fails.

In its complaint, Nevada also alleges that the site characterization process will disturb the surface and subsurface of the land in the affected area, and will interfere with other possible uses of the land. A state may, of course, have standing to redress injuries to its proprietary interests, such as the interests arising from property ownership. *Snapp*, 458 U.S. at 602–03, 102 S.Ct.

at 3266–67. As we have discussed above, however, Nevada does not own the affected property, nor has it alleged that it uses the property for any purpose. Thus, even assuming that the site characterization process will disturb the land, Nevada has failed to show that *it* will suffer on account of that disturbance. Proprietary standing is therefore not available to Nevada.

Finally, Nevada alleges that it has standing in its *parens patriae* capacity to advance the interests of its citizens. The Supreme Court has held that a state has a "quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general," and can therefore sue to protect these interests through a *parens patriae* action. *Id.* at 607, 102 S.Ct. at 3268. In this case, Nevada alleges that the selection of Yucca Mountain as the site for a national waste repository will have a devastating effect on the state's vital tourist industry. Although the Supreme Court has endorsed *parens patriae* suits in general, it has also stated that "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." *Id.* at 610 n. 16, 102 S.Ct. at 3270 n. 16 (stating that with respect to the citizens' rights in relation to the federal government, "it is the United States, and not the State, which represents them as *parens patriae*"). Our earlier case of *Washington Utilities & Transportation Commission v. FCC*, 513 F.2d 1142, 1153 (9th Cir.), *cert. denied*, 423 U.S. 836, 96 S.Ct. 62, 46 L.Ed.2d 54 (1975), must, of course, give way to the Supreme Court's clear statement in *Snapp*.

Because Nevada has failed to allege sufficient facts to demonstrate standing, we affirm the district court's dismissal of the action. We therefore do not reach the question of whether the district court was correct in dismissing Nevada's claims on the merits.

AFFIRMED.

Edward Lee CLEMMONS, Plaintiff-Appellant,

v.

Dale BOHANNON, Robert Tanay, Herb Maschner, and Robert Mills, Defendants-Appellees.

No. 88-2730.

United States Court of Appeals, Tenth Circuit.

Oct. 9, 1990.

Rehearing and Rehearing En Banc Granted Nov. 14, 1990.

State prisoner brought civil rights action alleging, inter alia, violations of his constitutional rights arising out of involuntary subjection to environmental tobacco smoke. Summary judgment for defendants was granted by the United States District Court for the District of Kansas, Dale E. Saffels, J., and prisoner appealed. The Court of Appeals, Seymour, Circuit Judge, held that: (1) exposing prisoner to unreasonable risk of debilitating or terminal disease offends "evolving standards of decency" protected by the Eighth Amendment; (2) relevant inquiry is whether long-term exposure to environmental tobacco smoke poses unreasonable risk of harm to an inmate's health; and (3) inmate's indefinite, involuntary exposure to environmental tobacco smoke in an eight-foot cell, by reason of involuntary double-celling with smokers, raised triable issue of fact as to whether such exposure created unreasonable risk to health.

Reversed and remanded in part and affirmed in part.

Tacha, Circuit Judge, filed a dissenting opinion.

1. Constitutional Law ⇐272(2)
Criminal Law ⇐1213.10(3)
Prisons ⇐17(2)

State prison policy of permitting indefinite double-celling of smokers with non-

90roc33

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

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MAY 25 4 20 PM '90

CLERK

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF NEVADA, ET AL.,

Defendants.

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MAY 29 1990
U.S. ATTORNEY, LAS VEGAS, NV

CIVIL-S- 90-65-HDM

MINUTES OF THE COURT

DATE: May 23, 1990

PRESENT: HOWARD D. McKIBBEN U.S. District Judge

Deputy Clerk: Cliff Chamblee Reporter: Lesley Clarkson

Counsel for Plaintiff(s) Karen Egbert

Counsel for Defendant(s) Brian McKay and Harry Swainston

COURT CONVENES AT 11:30 A.M. & CONCLUDES AT 12:10 P.M.

~~MINUTE ORDER IN CHAMBERS~~

PROCEEDINGS: HEARING MOTION OF DEFENDANTS FOR STAY OF PROCEEDINGS (#8):

Hearing is held on the motion of defendants for stay of proceedings, or in the alternative, to dismiss.

Arguments made.

IT IS ORDERED that the motion for stay of proceedings filed on behalf of defendants (#8) is GRANTED, and this action is stayed pending final resolution of the action presently pending in the Ninth Circuit Court of Appeals, case number 90-70004.

Court directs counsel in this action to file pleadings regarding any action taken by the Ninth Circuit Court of Appeals.

A formal order from this Court will subsequently be filed.

CAROL C. FITZGERALD, CLERK

By: Cliff Chamblee
Deputy Clerk

Exhibit + DCE

90-5-2-2-9

D/C

DEC 1 , 1990

UNITED STATES DISTRICT CO
DISTRICT OF NEVADA
RENO, NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF NEVADA, ET AL.,

Defendants.

CIVIL-S- 90-65-HDM (RJJ)

MINUTES OF THE COURT

DATE: December 14, 1990

PRESENT: HOWARD D. McKIBBEN U.S. District Judge

Deputy Clerk: Cliff Chamblee Reporter: Oma Rose-Recorder

Counsel for Plaintiff(s) Karen L. Egbert

Counsel for Defendant(s) Harry Swainston, Deputy Attorney General

COURT CONVENES AT 10:56 A.M. & CONCLUDES AT 11:20 A.M.

~~MINUTE ORDER IN CHAMBERS~~ TELEPHONE CONFERENCE CALL

PROCEEDINGS: HEARING MOTION FILED ON BEHALF OF DEFENDANT TO MAINTAIN STAY PENDING U.S. SUPREME COURT DECISION, ETC. (#22)

Hearing held and arguments made telephonically.

IT IS ORDERED that the stay in this action is lifted only for the plaintiff to file a motion for summary judgment, which will be considered filed as of this date; any opposition by defendants shall be filed no later than January 15, 1991, and any final reply shall be filed by January 25, 1991.

After all oppositions and replies are filed with respect to the motion for summary judgment, this matter shall stand submitted.

The stay in this action shall remain in effect for all purposes other than the issues for summary judgment.

CAROL C. FITZGERALD, CLERK

By: Cliff Chamblee
Deputy Clerk

cc Egbert, Gassaway

27

FEB 15 PAGE 2

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NO. 90-992

STATE OF NEVADA ET AL., PETITIONERS

v.

JAMES D. WATKINS, ET AL.

OPPOSITION OF RESPONDENTS-INTERVENORS
ARIZONA PUBLIC SERVICE COMPANY, ET AL.
TO MOTION TO DEFER CONSIDERATION

Respondents-Intervenors Arizona Public Service Company, et al. hereby support the Federal Respondents in opposing the Motion to Defer Consideration filed by Petitioners the State of Nevada, et al.

The Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. § 10101, et seq. ("NWPA"), directs the Department of Energy ("DOE") to characterize the Yucca Mountain, Nevada site to determine its suitability for the location of a deep geologic repository for the disposal of spent nuclear fuel and high-level radioactive waste resulting from the commercial generation of nuclear power and the government's defense activities. 42 U.S.C. § 10133(a). Congress' intent in enacting the NWPA was to provide a schedule and a process that would result in the timely and safe disposal of the nation's spent nuclear fuel and high-level

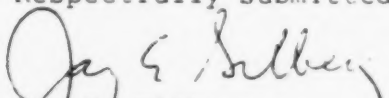
radioactive waste. Despite the clear Congressional directive to characterize the Yucca Mountain site, DOE has been prevented from proceeding with this effort, primarily as a result of a number of actions taken by the State of Nevada.

As explained in the opposition to the motion filed by the Federal Respondents, Nevada has refused to process several applications filed by the DOE for state permits that are a necessary prerequisite to the conduct of site characterization activities. As a result of this action, the United States filed a complaint over a year ago in the United States District Court for the District of Nevada seeking an injunction to compel Nevada to process its permit applications. At Nevada's request, and over the United States' objections, the District Court stayed that action pending the decision of the United States Court of Appeals for the Ninth Circuit in the case below, and has continued the stay pending this Court's disposition of the Petition for Certiorari filed herein. Given the direct relationship between the Court's disposition of the Petition for Certiorari and the resolution of the issues pending before the District Court, it is clear that Nevada's motion represents yet another attempt to further delay DOE's ability to obtain access to the Yucca Mountain site to fulfill its statutory mandate. Any unnecessary further delay in the resolution of this controversy would be contrary to the compelling national interest, reflected in the NWPA, in providing for the permanent disposal of radioactive waste.

CONCLUSION

For the reasons stated above and in the Federal Respondents opposition, the motion to defer consideration should be denied.

Respectfully submitted,



Jay E. Silberg
Attorney for
Respondents-Intervenors Arizona Electric Public Service Company, et al.

CERTIFICATE OF SERVICE

Pursuant to Rule 28 of the Rules of the Supreme Court of the United States, I hereby certify that I have, on this 13th day of February 1991, deposited in first class mail with postage affixed, a copy of the foregoing Opposition of Respondents-Intervenors Arizona Public Service Company, et. al. to Motion to Defer Consideration on the following:

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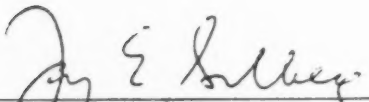

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